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The Israel-Palestine Conflict in International Law: Territorial Issues

Iain Scobbie with Sarah Hibbin
Introduction by Henry Siegman

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The Israel-Palestine Conflict in International Law: *Territorial Issues*

Iain Scobbie with Sarah Hibbin
and an Introduction
by Henry Siegman

U.S./Middle East Project
and
the Sir Joseph Hotung Programme for Law, Human
Rights and Peace Building in the Middle East, School
of Oriental and African Studies, University of London

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The Sir Joseph Hotung Programme for Law, Human Rights and Peace Building in the Middle East works to highlight and promote the use of international law and human rights in respect to the engagement of all parties, including third States, to Israeli-Palestinian relations.

The goal is to generate policy-oriented scholarship that will support the development of practical strategies for a just and lasting peace in the region.

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The U.S./Middle East Project was established in 1994 by the Council on Foreign Relations (CFR) under the direction of Henry Siegman, a senior fellow on the Middle East at the Council. In 2006, the U.S./Middle East Project became an independent policy institute. Its mission is to provide non partisan analysis of the Middle East peace process and to present policymakers in the United States, in the region and in the larger international community with balanced policy analysis and policy options to prevent conflict and promote stability, democracy, modernization and economic development throughout the region.

The U.S./Middle East Project pursues these goals under the guidance of an International Board chaired by General (Ret.) Brent Scowcroft (President, Forum for International Policy; former National Security Adviser to President Gerald Ford and President George H.W. Bush). The International Board comprises eminent personalities with extensive experience, in government and in the private sector, in dealing with the political, economic and social aspects of this critical and troubled region.

The U.S./Middle East Project pursues its mission through a range of activities that include studies, periodicals and publications, conferences, consultations with heads of states in the region and collaboration with a wide range of international agencies pursuing similar goals.

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As with all publications of the U.S./Middle East Project, the views expressed by the authors are their own.

INTRODUCTION

Conflict resolution and peacemaking are political rather than legal exercises. Parties to a conflict may agree to relinquish rights granted them in international law, particularly if such concessions serve to obtain comparable trade-offs from the other side. What matters for the achievement and sustainability of a peace accord is that it not leave any of the parties with a deep sense of having been victimized by a one-sided and unjust agreement. Such a lingering sense of unfairness and victimization inevitably fuels a *revanchism* that sooner or later rekindles the conflict.

And yet, international law – particularly its most fundamental norms, known as “peremptory norms” – needs to be taken into account by would-be peacemakers, not for “legalistic” reasons, too often seen as irrelevant to the political dynamics of the conflict, but because they embody quintessential principles of fairness and justice. International law does not allow states to disregard peremptory norms in the conduct of their international relations, nor may they enter into agreements that conflict with them.

In the context of the Israel-Palestine conflict, there are two such peremptory norms with the deepest implications for the resolution of its territorial aspects. They are the democratic principle of the right to self-determination by a majority population in previously mandated territories, and the prohibition against the acquisition of territory by war, which applies to aggressors and victims alike. That is why what international law has to say about the territorial issues in this conflict, as described in *The Israel-Palestine Conflict in International Law: Territorial Issues* by Iain Scobbie and Sarah Hibbin, cannot be ignored by would-be peacemakers. It is because so far it has been largely ignored that all previous peace initiatives have come to grief.

Because these two peremptory norms are dealt with extensively in the following essay, there is no need to expatiate on them here, other than to stress their important role in the perception of the fairness of any proposed terms for a permanent

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status agreement and the sustainability of such an agreement over time. There are other considerations that also touch on the fairness of an agreement that need to be addressed by the international community and by U.S. policymakers, to whom the international community looks to assume the lead in moving the parties to an accord that will end the conflict and result in “two states living alongside each other in peace and security.”

From a Palestinian perspective, the UN General Assembly’s Partition Plan of 1947 recognized that 43 percent of Mandate Palestine can rightfully be claimed by the Arab population as its legitimate patrimony. This should have brought into question Israel’s claim to the additional roughly 25 percent of Palestinian territory it acquired during its War of Independence in 1948. Nevertheless, Palestinians realize that UN Security Council Resolution 242 and 338 demanded of Israel to withdraw to the 1949 Armistice line, not the lines of the Partition Resolution. More importantly, the PLO formally recognized Israel within its newly enlarged borders in 1988, and again in 1993 in the context of the Oslo Accords.

But Palestinian agreement to this drastic shrinkage of their patrimony, reducing the territory assigned to them by the Partition Plan by half – leaving them with 22 percent of Mandate Palestine – only served to deepen their sense of unfairness and outrage that in the aftermath of the 1967 war, Israel has sought to enlarge the 78 percent of Palestine it had already acquired by confiscating additional Palestinian territory from the little that was left them.

Because Israeli leaders so often demand that Palestinians make “concessions” that match Israeli “concessions,” it is important to note that Palestinians have not asked Israel to make any territorial concessions – i.e., give up any of the territory Israel acquired in the war of 1948 – nor has Israel ever indicated it would under any circumstances consider doing that. What Palestinians have asked is that Israel return Palestinian territory on which Israel has illegally established settlements, and to which it has transferred its own population, in violation of treaty obligations and international law. To describe the return of illegally confiscated Palestinian territory as Israeli concessions not only enrages Palestinians but compromises their rights even before negotiations for a peace agreement begin.

That the settlements established by Israel on Palestinian territory and in East Jerusalem are in clear violation of

international law and of several agreements that Israel and the PLO signed onto has been established beyond doubt by the International Court of Justice (ICJ) in its 2004 ruling, *Legal consequences of the construction of a wall in the occupied Palestinian territory*. Both Israel and the previous U.S. administration opposed the General Assembly's resolution asking the ICJ to render its opinion on this question. Not surprisingly, Israel and Israel's supporters in the U.S. have sought to dismiss the standing of the International Court's opinion because it is "non-binding" and "merely advisory." As pointed out in the Scobbie/Hibbin paper, that is a serious misrepresentation.

Two types of cases come before the ICJ. The first pertains to disputes between litigating states in which the parties are legally bound by the Court's decision. The second, which applies to the 2004 ruling, follows upon the request of an international body for an authoritative interpretation of the law. This type of ruling is "non-binding" only in the sense that there are no litigants before the Court to be bound by its decision. This does not mean, however, that the ruling is without legal effect. On the contrary, the Court's opinion possesses the highest legal authority, and stands as precedent for any future proceedings involving actual litigants. The fact that such rulings are called "advisory opinions" in no way detracts from their status as fully authoritative statements of the law.

As noted by Scobbie and Hibbin, in the *Western Sahara* advisory opinion of 1975, ICJ Judge Gros observed:

I shall merely recall that when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.

Only one judge dissented from the Court's formal conclusions in the ICJ's decision in the *Legal consequences of the construction of a wall in the occupied Palestinian territory* opinion but did so principally for procedural reasons. Nevertheless, he expressly

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agreed with the Court's rulings on the fundamental principles that frame the legal relationship between Israel and Palestine – namely, that international humanitarian law, including the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, and international human rights law apply in the occupied Palestinian territory; that the Palestinian people has a right of self-determination that must be fully protected; and that Israeli settlements in the occupied territories are unlawful, as they breach Geneva Convention IV, Article 49.6.

The 2004 ICJ decision upholding the right of the Palestinians to self-determination in the West Bank and Gaza (within the pre-1967 borders) and the inadmissibility of the acquisition of territory by war does not therefore represent “one opinion among many.” Rather, it is the authoritative interpretation of the law. No further questions can thus exist with respect to these key legal points of the conflict.

There is also a widespread misconception as to what constitutes “improper intervention” by outside parties in the Israel-Palestine conflict, and the impermissibility of an “imposed settlement.” In fact, the international community has not sought to impose a settlement, but is demanding that the parties abide by their obligations under international law and implement commitments to which they obligated themselves in a number of previous accords, including the Oslo Accords, the Road Map and the Annapolis understandings.

But more to the point, international law actually *requires* that when it comes to peremptory norms, such as the right to self-determination and the impermissibility of acquiring territory by war, both the UN *and individual states* do whatever they can to secure their implementation. The General Assembly declared in Resolution 2625 (24 October, 1970), *inter alia* that:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter, regarding the implementation of the principle ...

Resolution 2625 is accepted to be an authoritative interpretation of the fundamental legal principles expressed in the provisions of

the UN Charter. This places another layer of obligation on Israel: "Not only is it bound to negotiate in good faith to end the occupation, but also it is under a peremptory duty to promote Palestinian self-determination." This peremptory duty is one which binds all states, and, by extension, the United Nations.

European Union foreign policy chief Javier Solana's recent suggestion that the UN Security Council assume responsibility for establishing a Palestinian state if the parties will not have reached an agreement by a certain date is therefore not a personal policy preference of Mr. Solana but an obligation of member states and international institutions. It is what they are required to do in order to secure the implementation of peremptory norms.

In fact, the Security Council's responsibility for resolving the consequences of the Six-Day War if the parties are unable to do so was implicit in the resolutions' language, which stressed the inadmissibility of acquiring territory as a result of war. The plain logic of the resolution's "default setting," in case the parties to the conflict fail to reach an agreement, is that the situation returns to the *status quo ante*, without territorial or other changes that negotiations and a peace agreement might have produced.

Israel's occupation policies and its vast settlement enterprise have been based on the contrary assumption – that if no peace agreement is reached with the Palestinians, the resolutions' "default setting" is Israel's indefinite occupation of Palestinian lands and people. If this reading were correct, the Security Council Resolutions 242 and 338 would have served as an irresistible invitation to Israel – and to all occupiers – to avoid peace talks in order to preserve the status quo, which of course is exactly what Israel has been doing. As noted by Scobbie and Hibbin, Benvenisti argues that:

an occupation regime that refuses to earnestly contribute to efforts to reach a peaceful solution should be considered illegal. Indeed, such a refusal should be considered outright annexation. The occupant has a duty under international law to conduct negotiations in good faith for a peaceful solution. It would seem that an occupant who proposes unreasonable conditions, or otherwise obstructs negotiations for peace for the purpose of retaining control over the occupied territory, could be considered a violator of international law.

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It would seem, therefore, that if the Israel-Palestine conflict is not resolved within a timeframe to be set by the Security Council, the Security Council is obliged to invoke the “default setting” of the 1967 and 1973 resolutions. The Security Council would then have to set its own terms for an end to the conflict and arrange for an international force to take control of the occupied territories to help establish the rule of law, assist Palestinians in building their institutions, assure Israel’s security by preventing cross-border violence, and oversee the implementation of its terms for an end to the conflict.

The application of international law, particularly its peremptory norms regarding self-determination and the inadmissibility of acquiring territory by war to the Israel-Palestine conflict, is indispensable to its resolution. We hope this publication contributes to that outcome.

Henry Siegman
President
U.S./Middle East Project

I. DELINEATION OF THE AREA IN ISSUE

This paper addresses the question of what territory a future State of Palestine may lay claim to under contemporary international law. It also addresses the question of what is the legal basis for, and integrity of, Israel's territorial claims. Further, should the Middle East Peace Process fail, the question arises whether Israel could lawfully retain the occupied territories under its control.

Under contemporary international law, the principal issue—whether any future State of Palestine is entitled to lay claim to territory—may be answered unequivocally: the Palestinian Arab population has the right to self-determination.

The International Court of Justice affirmed that the Palestinian Arabs constitute a people entitled to exercise the right to self-determination in the *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion. The function of the advisory jurisdiction of the International Court of Justice, which is based in Article 65.1 of its Statute,¹ is to provide legal advice to international organizations as the Court expressly acknowledged in the *Legality of the threat or use of nuclear weapons* advisory opinion.²

The term “advisory” is sometimes misconstrued by parties disadvantaged by the court's opinion as lacking in legal authority because it is not a “binding judgment.” But an advisory opinion is non-binding³ only in the technical sense that there are no litigants before the court to be bound. The court's advisory opinion is nevertheless a fully authoritative statement of the law. As Judge Gros observed in the *Western Sahara* advisory opinion:

¹ Article 65.1 provides: “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request”.

² “The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”: *Legality of the threat or use of nuclear weapons* advisory opinion, ICJ Rep, 1996, 226 at 236, para.15.

³ See *Western Sahara* advisory opinion, ICJ Rep, 1975, 12 at 24, para.31--“the Court's reply is only of an advisory character: as such it has no binding force.”

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I shall merely recall that when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.⁴

On self-determination, in the *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, the International Court ruled:

As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example,

⁴ *Western Sahara* advisory opinion, ICJ Rep. 1975, 12, declaration of Judge Gros, 69 at 73, para.6: see also Hambro E, *The authority of the advisory opinions of the International Court of Justice*, 3 *International and Comparative Law Quarterly* 2 (1954).

resolution 58/163 of 22 December 2003).⁵

The right to self-determination was vested in the population(s) of Palestine when the Mandate was created in 1922 in accordance with Article 22 of the Covenant of the League of Nations. The first paragraph of Article 22 provided:

To those colonies and territories which as a consequence of the late War have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

In the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* advisory opinion, the International Court of Justice ruled that “the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.”⁶

As the Mandate for Palestine was a Class A Mandate,⁷ it presupposed eventual independence for the territory. Its nature was defined by Article 22.4 of the League Covenant which acknowledged that territories which had previously formed part of

⁵ *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, ICJ Rep, 2004, 136 at 182-183, para.118. This was a unanimous ruling by the Court. Although one judge found that the Court should have exercised its discretion and refused to accede to the request for an advisory opinion, and thus dissented from the Court’s formal conclusions, he nonetheless expressly affirmed that the Palestinian people possesses the right to self-determination, see Declaration of Judge Buergenthal, ICJ Rep, 2004, 240 at 241, para.4. All documents of the International Court of Justice and of its precursor, the Permanent Court of International Justice, cited in this paper are available online at <www.icj-cij.org>.

⁶ *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* advisory opinion [hereinafter *Namibia* advisory opinion], ICJ Reps, 1971, 16 at 31, para.53: reaffirmed *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171-172, para.88.

⁷ See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 165, para.70.

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the Ottoman Empire had “reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.” Although the Mandate for Palestine was awarded to Britain in April 1920, it was not ratified by the League of Nations until July 1922. It included within its territorial scope land east of the River Jordan: in September 1922, the British government presented a memorandum to the League of Nations stating that Transjordan, the area east of the Jordan, should be excluded from all the provisions dealing with Jewish settlement.⁸ This proposal was approved by the Council of the League of Nations,⁹ and was reflected in Article 25 of the Mandate, which provided:

In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.¹⁰

⁸ Of particular relevance to the question of Jewish settlement were Articles 2 and 6 of the Mandate. Article 2 provided, “The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion;” and Article 6, “The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.” The Mandate is available at <http://avalon.law.yale.edu/20th_century/palmanda.asp>; 104 British and Foreign State Papers 842; and Hudson MO, *International legislation* (Carnegie Endowment for International Peace: Washington DC; 1931) Vol.I, 120.

⁹ See 21st Session of the League Council, 8th Meeting (Public), 16 September 1922, 3 League of Nations Official Journal (1922: No.11, Part II) 1188-1189: it was agreed that Transjordan should be withdrawn from the special provisions which were intended to provide a national home for the Jews west of the River Jordan.

¹⁰ Article 15 of the Mandate dealt with freedom of conscience and worship;

Although, technically, only one Mandate existed, Britain adopted separate administrative regimes for the two territories, administering the part west of the River Jordan as "Palestine", and the part east of the Jordan as "Transjordan".¹¹ Following this terminology, all references in this paper to "Palestine" and "Mandate Palestine" refer to the territory west of the River Jordan. It has been claimed that the League's adoption of the British proposal radically reduced "the size of the territory earmarked for Jewish rule as compared with the original 'Jewish national home' of the Palestine Mandate,"¹² nevertheless this arrangement led the International Court to comment:

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.¹³

Transfer of authority to an indigenous government in Transjordan took place incrementally, with most administrative functions being transferred by virtue of the 20 February 1928 Agreement between the United Kingdom and Transjordan respecting the Administration of the Latter.¹⁴ Expressly relying on this Agreement, in *Jawdat Badawi Sha'ban v Commissioner for Migration and Statistics*, the Supreme Court of Palestine ruled:

Trans-Jordan has a government entirely independent of

Article 16 with the Mandatory's supervision of religious and charitable bodies; and Article 18 prohibited discrimination against the nationals of any member State of the League in matters related to commerce, finance and navigation.

¹¹ It is significant that Britain, in declaring applicable certain treaty commitments to its overseas territories—such as the 1904 Paris Agreement for the Suppression of the "White Slave Trade" (I League of Nations Treaty Series 83) and the 1910 Paris Agreement for the Repression of Obscene Publications (103 British and Foreign State Papers 251)—listed Palestine and Transjordan separately. See the *Multilateral treaties deposited with the Secretary-General* database, <<http://treaties.un.org/Pages/ParticipationStatus.aspx>>.

¹² Blum YZ, *The juridical status of Jerusalem* (Hebrew University: Jerusalem: 1974) 7.

¹³ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 165, para.70.

¹⁴ 128 British and Foreign State Papers 273; and United Kingdom Treaty Series No7 (1930).

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Palestine—the laws of Palestine are not applicable in Trans-Jordan nor are their laws applicable here. Moreover, although the High Commissioner of Palestine is also High Commissioner for Trans-Jordan, Trans-Jordan has an entirely independent government under the rule of an Amir and apart from certain reserved matters the High Commissioner cannot interfere with the government of Trans-Jordan—at the most he can advise from time to time. His Britannic Majesty has entered into agreements with His Highness the Amir of Trans-Jordan in which the existence of an independent government in Trans-Jordan under the rule of the Amir has been specifically recognised (see Agreement dated 20.2.28). It is clear therefore that Trans-Jordan exercises its powers of legislation and administration through its own constitutional government which is entirely separate and independent from that of Palestine.¹⁵

This process of the devolution of sovereignty culminated in the independence of Transjordan as a result of the 22 March 1946 Treaty of Alliance between the United Kingdom and Transjordan.¹⁶ As Crawford observes, the effect of this separation is that issues of self-determination in respect of “Palestine properly so called, that is the area west of the 1922 line” must be considered on their own. The territory which became Transjordan is irrelevant in this equation.¹⁷ While the Jewish population of Mandate Palestine attained its self-determination with the declaration of Israel’s independence, the Palestinian Arab population has yet to do so. The exercise of this right was effectively submerged in the aftermath of the 1948-49 Arab-Israeli war and only resurfaced as an international concern towards the end of the 1960s.

Nevertheless, the Secretary-General of the League of Arab States alluded to the Palestinian right to self-determination in a cablegram sent to the Secretary-General of the United Nations on

¹⁵ *Jawdat Badawi Sha'ban v Commissioner for Migration and Statistics* (Supreme Court of Palestine sitting as the High Court of Justice: 14 December 1945), 12 Law Reports of Palestine 551 (1945) 553.

¹⁶ United Nations Treaty Series 74 (subsequently replaced by the 15 March 1948 Treaty of Alliance between the United Kingdom and Transjordan, 77 United Nations Treaty Series 994): on the separation of Palestine and Transjordan, see Crawford J, *The creation of States in international law* (Clarendon Press: Oxford: 2006, 2nd edn) 423-424.

¹⁷ Crawford, above n.16 (*Creation of States*), 424.

15 May 1948. This cablegram sought to explain why Arab States had intervened forcibly against Israel. It noted that the Arab League Charter declared that Palestine became an independent State on its separation from the Ottoman Empire but that, for reasons beyond the will of its people, it had been unable to exercise the rights and privileges of independence.¹⁸ The cablegram continued that, as the Mandate had come to an end “leaving no legally constituted authority behind in order to administer law and order”, the Arab League affirmed that the right to create a government “pertains to its inhabitants under the principles of self-determination recognised by the Covenant of the League of Nations as well as the United Nations Charter.”¹⁹

Jordan was a founder member of the Arab League, but in December 1948 it adopted a policy which aimed to incorporate the West Bank, which it then occupied, into its own territory. On 24 April 1950, the Jordanian House of Assembly promulgated a resolution which provided in part:

in accordance with the right of self-determination...the Jordan Parliament, representing both banks, decides...

1. Approval is granted to complete unity between the two banks of the Jordan, the Eastern and the Western, and their amalgamation in one single State...
2. Arab rights in Palestine shall be protected. These rights shall be defended with all possible legal means and this unity shall in no way be connected with the final settlement of Palestine's just case within the limits of national hopes, Arab cooperation and international justice.

This decision was to become effective on its approval by the King of Jordan, which was given later that same day. Subsequently the Political Committee of the Arab League declared that Jordan's annexation of Arab Palestine violated its resolution of 12 April 1950 which had prohibited the annexation of any part of Palestine. A compromise was reached between the League and Jordan, and

¹⁸ Cablegram from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations, 15 May 1948, UN Doc. S/745, para.7, reproduced 3 SCOR, May 1948 Supp, 83-88. The declaration on the status of Palestine is set out in the 1945 Pact of the League of Arab States, Annex on Palestine, available at <www.yale.edu/lawweb/avalon/mideast/arableag.htm#1>; and 70 United Nations Treaty Series 241.

¹⁹ UN Doc. S/745, para.10.

on 31 May 1950 Jordan declared that the annexation was without prejudice to the final settlement of the Palestine issue.²⁰ Only the United Kingdom and Pakistan formally recognised Jordan's annexation of the West Bank. The United Kingdom's policy, to which the United States raised no objection, was that the incorporation of the West Bank into Jordan was "undoubtedly the only logical solution and the one best calculated to ensure the welfare of its inhabitants" and "would be an important contribution towards the stability of that area."²¹ Moreover, in the aftermath of the Six-Day War in 1967 and 1968, the United States gave assurances to King Hussein of Jordan that it did not envisage that Jordan would be confined to the East Bank, as it was prepared to support the return of the West Bank to Jordan "with minor boundary rectifications."²² Similarly, Israel's stance was to ignore calls by West Bank Arabs for a separate existence, preferring instead to deal with Jordan.²³ Israel simply did not view with favor

²⁰ For a dossier of the relevant documents, see Whiteman M (Ed), *2 Digest of International Law* (Dept of State: Washington DC: 1963) 1163-1168: see also Blum, above n.12 (*Jerusalem*), 16-18.

²¹ See National Archives, CAB/129/39, Records of the Cabinet Office, *Memorandum by the Foreign Secretary on the Arab States and Israel*, 20 April 1950, CP (50) 78, quotation at paras.8 and 9: for United States' non-objection, see National Archives, CAB/128/17, Records of the Cabinet Office, Minutes of Meeting 27 April 1950, CM (50) 26, 163, para.6. For the United Kingdom's formal statement of recognition, see 474 HC Deb (5th Ser) cols.1137-1139 (27 April 1950): reproduced 2 Whiteman 1167-1168. The United Kingdom maintained its view that territorial settlement was a matter to be decided between Israel and Jordan after the Six-Day War: see, for instance, Eileen Denzer *Memorandum on Jerusalem and the Holy Places* (11th October 1971), FCO17/605.

²² See *Foreign Relations of the United States, 1964-68: Vol.XIX, Arab-Israeli crisis and war, 1967* (US Government Printing Office: Washington DC: 2004) [hereinafter XIX FRUS 1964-68, available online at <www.state.gov/r/pa/ho/frus/johnsonlb/xix/>], Doc.506, *Telegram from the Department of State to the Embassy in Israel, 30 November 1967*, 998; and Doc.501, *Telegram from the Mission to the United Nations to the Department of State, 4 November 1967*, 981 at 982-983; and also *Foreign Relations of the United States, 1964-68: Vol.XX, Arab-Israeli dispute 1967-68* (US Government Printing Office: Washington DC: 2004) [hereinafter XX FRUS 1964-68, available online at <www.state.gov/r/pa/ho/frus/johnsonlb/xx/>], Doc.328, *Telegram from the Embassy in Jordan to the Department of State, 20 November 1968*, 653-654; and Doc.353, *Telegram from the Embassy in Jordan to the Department of State, 19 December 1968*, 697 at 699.

²³ See XIX FRUS 1964-68, Doc.448, *Memorandum of conversation, 24 October 1967*, 944 at 946; Doc.491, *Telegram from the Mission to the United Nations to the Department of State, 26 October 1967*, 953 at 955; and Doc.494, *Memorandum from the President's Special Counsel (McPherson) to President Johnston, 31 October 1967*, 961.

the creation of a “buffer State” on the West Bank which it thought would be “only a temporary problem child.” It claimed that most Palestinians wanted to be associated with whoever was in charge of the East Bank.²⁴ Gerson notes that Israel did not contest the lawfulness of Jordan’s control over the West Bank, as shown by its calls for a peace treaty which contained border modifications.²⁵ In contrast, Blum claims that the “non-prejudice clause” in the 1949 Israel-Jordan Armistice Agreement (on which, see below Section VIII) froze the parties’ rights and claims to the territory of the West Bank. As long as this remained in force, no unilateral act could alter the rights of either party, thus Jordan’s purported annexation of the West Bank lacked any legal effect.²⁶ The Israel-Jordan Armistice Agreement terminated, at the latest, with the outbreak of the Six-Day War in 1967.²⁷ Under general international law, Jordan’s purported annexation of the West Bank would fall foul of the presumption against the change in status of occupied territory and the prohibition of the acquisition of territory through the use of force (see below Section X).

The Jordanian claim to sovereignty over the West Bank was finally renounced in 1988,²⁸ and in the 1994 Israel-Jordan Peace Treaty, the land boundary employed was the Mandate boundary, as amended in 1922 when Palestine and Transjordan were constituted as separate administrative units. Article 3 provided, in part:

1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex I (a), on the mapping materials attached thereto and coordinates specified therein.
2. The boundary, as set out in Annex I (a), is the permanent, secure and recognized international boundary

²⁴ XX FRUS 1964-68, Doc.346, *Telegram from the Embassy in Israel to the Department of State*, 11 December 1968, 685 at 686.

²⁵ Gerson A, *Israel, the West Bank and international law* (Cass: London: 1978) 80.

²⁶ Blum YZ, *The missing reversioner: reflections on the status of Judea and Samaria*, 3 Israel Law Review 279 (1968) at 288.

²⁷ See Sabel R, *The International Court of Justice’s decision on the separation barrier and the green line*, 38 Israel Law Review 316 (2005) at 324. Israel’s apparent acquiescence in the Jordanian annexation of the West Bank is considered below.

²⁸ This was announced by King Hussein in his 31 July 1988 *Address to the Nation*: reproduced <www.kinghussein.gov.jo/88_july31.html>.

between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967.²⁹

Apart from the incorporation of the West Bank into Jordan until 1967, and the perception that Palestinians displaced from the territory of Mandate Palestine primarily constituted a refugee problem,³⁰ it has been claimed that the lack of a representative Palestinian body was a major reason why the question of Palestinian self-determination disappeared from the United Nations' agenda during the 1950s and 1960s.³¹

Another relevant factor in this equation is undoubtedly that when the substantive law of self-determination was being developed in the 1960s by the United Nations, its principal concern was decolonization. It is significant that the seminal United Nations instrument in the development of self-determination—General Assembly resolution 1514 (XV) (15 December 1960)—was entitled the *Declaration on the granting of independence to colonial countries and peoples*. The focus of this process was the eradication of saltwater and, to a lesser extent, settler colonialism. As a rule of thumb, “saltwater” colonialism describes the situation where the colony and the metropolitan territory are separated by an ocean, while “settler” colonialism exists where a minority settler group maintains dominance over an ethnically different indigenous majority. The latter was exemplified, in the 1960s, principally by South West Africa/Namibia, while the situation in Rhodesia may be seen to straddle the two categories. Jordan's occupation and ostensible annexation of the West Bank (and, similarly, Egypt's occupation of Gaza without pretensions to sovereignty) fell into neither. Thus the entitlement of the Palestinian Arab population to self-determination, and the exercise of this right, were marginal to

²⁹ 26 October 1994 Treaty of Peace between the Hashemite Kingdom of Jordan and the State of Israel, 2042 United Nations Treaty Series 35325: reproduced as UN Doc.A/50/73 and S/1995/83 (27 January 1995); and also available at <www.kinghussein.gov.jo/peacetreaty.html>; and 34 International Legal Materials 43 (1995).

³⁰ See XX FRUS 1964-68, Doc.256, *Memorandum of conversation*, 504—during this conversation Rabin, then Israeli ambassador to Washington, stated “The refugee problem is the Palestine problem” in response to United States Secretary of State Rusk's observation that the Palestine question was a large and complex package (at 504-505).

³¹ See Fox MJ, *Missing the boat to self-determination: Palestine and Namibia in retrospect*, 20/3 Arab Studies Quarterly 15 (1998), 16, n.8.

the immediate concerns of the United Nations during the period in which the substantive content of self-determination was being formulated and elaborated.

Only in General Assembly resolution 2535 (1969) were the “inalienable rights” of “the people of Palestine” first formally recognized by the United Nations,³² but this resolution focussed on refugees and the United Nations Relief and Works Agency for Palestine Refugees. The General Assembly recalled this resolution in resolution 2672 (1970), which again was principally concerned with refugees and UNRWA, but amplified its earlier statement on inalienable rights in its recognition that “the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations.”³³

Similarly, although the Palestine Liberation Organisation was created in 1964, it was only granted official status by the United Nations by General Assembly Resolution 3210 (XXIX) (14 October 1974), *Invitation to the Palestine Liberation Organization*. This provided:

The General Assembly,
Considering that the Palestinian people is the principal party to the question of Palestine.
Invites the Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings.

On 28 October 1974, the seventh Arab League Summit Conference, meeting in Rabat, adopted a resolution on Palestine which affirmed “the right of the Palestinian people to establish an independent national authority under the command of the Palestine Liberation Organization,” which was recognised for the first time as “the sole legitimate representative of the Palestinian people.”³⁴ This was followed by General Assembly resolution 3237

³² General Assembly resolution 2535 (XXIV) (10 December 1969), *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Part B, operative para.1.

³³ General Assembly resolution 2672 (XXV) (8 December 1970), *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Part C, operative para.1.

³⁴ Paragraph 2: reproduced <www.monde-diplomatique.fr/cahier/proche-orient/rabat74-en>.

(XXIX) (22 November 1974) which granted the Palestine Liberation Organisation observer status in the United Nations, and in resolution 43/177 (15 December 1988), the General Assembly decided that the designation "Palestine" should be used in place of "Palestinian Liberation Organisation" in the United Nations system. Finally, to alleviate practical difficulties faced by the Palestinian delegation in the performance of its tasks, additional rights and privileges of participation in the work of the General Assembly as an observer were granted to Palestine by General Assembly resolution 52/250 (7 July 1998).³⁵

A. TITLE TO TERRITORY: THE DOCTRINES OF UTI POSSIDETIS AND RELATIVITY OF TITLE

The territory which forms the basis for the exercise of the Palestinian people's right to self-determination can only lie within the boundaries of the former Mandate Palestine situated west of the River Jordan. This is in accordance with the principle of *uti possidetis iuris* which is associated with the decolonization process, and thus the exercise of the right of self-determination. In the *Case concerning the frontier dispute (Burkina-Faso/Mali)*, the International Court ruled:

23. ...The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term...

24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the

³⁵ The practical difficulties which led to the adoption of this resolution were adverted to by Sucharipa, the representative of Austria, speaking on behalf of the European Union, associated Central and Eastern European States, Cyprus, Iceland and Norway, see UN Doc.A/52/PV.89, 5; Fowler, the representative of Canada, *ibid*, 6; and Millar, the representative of Australia, *ibid*, 6.

territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*.³⁶

As a result of the administrative separation of Palestine and Transjordan in 1922, the *uti possidetis* rule excludes any consideration that the territory to the east of the River Jordan is relevant to the question of the self-determination of the Palestinian Arab population. The operation of *uti possidetis* may also be seen in both the granting of independence to Jordan in 1946, and the delineation of its boundary with Israel in Article 3 of the 1994 Israel-Jordan Peace Treaty. Consequently, issues of self-determination in respect of "Palestine properly so called, that is the area west of the 1922 line" must be considered only in relation to that territory.³⁷

Under international law, the ascription of title to territory is essentially relative. As the Permanent Court of International Justice observed in the *Eastern Greenland* case:

Another circumstance which must be taken in to account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which sovereignty is also claimed by some other power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is stronger...

It is impossible to read the records of the decisions in cases as to territorial sovereignty without

³⁶ *Case concerning the frontier dispute (Burkina-Faso/Mali)*, ICJ Rep, 1986, 554 at 556, paras.23-24: see 565-567, paras.20-25 generally. This judgment was delivered by a Chamber of the International Court, comprising Judges Bedjaoui, Lachs and Ruda, with Judges *ad hoc* Luchaire and Abi-Saab. Under Article 27 of the Statute of the International Court, a judgment given by a Chamber of the Court "shall be considered as rendered by the Court."

³⁷ Crawford, above n.16 (*Creation of States*), 424: see also Rosenne S, *Israel's Armistice Agreements with the Arab States* (Blumstein: Tel Aviv: 1951) 48.

observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.³⁸

The principal purported exception to the relative nature of claims to territory is now otiose, namely, the historic claim that some territories constituted *terra nullius* which were susceptible to acquisition by (European) colonizers through discovery and occupation. Apart from some exceptional cases, it is doubtful if this was ever an accurate account of the law³⁹ and, in any event, this doctrine could never have been applied to mandated territories. Although these were classified by Article 22 of the Covenant of the League of Nations as "territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them," Mandatories acquired neither title to nor sovereignty over mandated territories, and during the currency of the League of Nations it remained unclear where sovereignty lay.⁴⁰ In his influential separate opinion in the *International status of South West Africa* advisory opinion, Judge McNair argued:

Upon sovereignty a very few words will suffice. The Mandates System (and the "corresponding principles" of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit

³⁸ *Case concerning Eastern Greenland* (Denmark v Norway) PCIJ Ser.A/B, No.53 (1933) at 46; see also *Case concerning Minquiers and Ecrehos* (France/United Kingdom), ICJ Rep, 1953, 47 at 67.

³⁹ See the *Western Sahara* advisory opinion, ICJ Rep, 1975, 12 at 39. para.80; Hackshaw F, *Nineteenth century notions of aboriginal title and their influence on the interpretation of the Treaty of Waitangi*, in Kawharu IH (Ed), *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (Oxford UP: Auckland: 1989) 92; Jennings RY and Watts AW (Eds), *Oppenheim's international law. Volume I: Peace* (Longmans: London: 1992, 9th edn) 687; and Korman S, *The right of conquest: the acquisition of territory by force in international law and practice* (Clarendon Press: Oxford: 1996) 42-43 and 46-47.

⁴⁰ For an overview of this issue, see Lauterpacht H, *The Mandate under international law in the Covenant of the League of Nations*, in Lauterpacht E (Ed), *International law: being the collected papers of Hersch Lauterpacht. Volume III: The law of peace, Parts II-VI* (Cambridge UP: Cambridge: 1977) 29 at 66-69.

into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate.⁴¹

McNair's notion that sovereignty over mandated territory was in abeyance pending independence is consonant with the view subsequently expressed in the *Namibia* advisory opinion that the "sacred trust" at the heart of the Mandate system was the entitlement of the population of mandated territories to self-determination.⁴² Especially in the light of subsequent legal developments, there is much to commend McNair's argument but, as Blum observes, all the theories of sovereignty over mandated territories assumed that sovereignty was located somewhere. Accordingly it followed that, on the termination of the Mandate, no mandated territory could be considered as *terra nullius* and therefore open to acquisition by any existing State.⁴³

Thus the identification of the areas over which the Palestinian people is entitled to exercise self-determination requires an investigation of the relative strengths of the territorial claims vested in the two communities established in Mandate Palestine. While no external power may lay claim to this territory, conversely, the exercise of self-determination cannot involve claims to territory which lies beyond the boundaries of Mandate Palestine, as the application of the "principle of *uti possidetis*

⁴¹ *International status of South West Africa* advisory opinion, separate opinion of Judge McNair, ICJ Rep, 1950, 146 at 150.

⁴² *Namibia* advisory opinion, ICJ Rep, 1971, 31-32, paras.52-53.

⁴³ Blum, above n.26 (*Missing reversioner*) 283; see also Crawford, above n.16 (*Creation of States*), 432-433.

Delineation of the Area in Issue

freezes the territorial title.”⁴⁴

⁴⁴ *Case concerning the frontier dispute (Burkina-Faso/Mali)*, ICJ Rep, 1986, 568, para.30.

II. THE INTER-TEMPORAL RULE AND SELF-DETERMINATION

The substantive content of self-determination has changed since 1922, and only its contemporary content is now relevant in determining the subsisting rights it confers on the Palestinian Arab population. This is in accordance with the inter-temporal rule, sometimes expressed in the Latin maxim *tempus regit factum*, which is a structural principle of international law.⁴⁵ Although subject to further jurisprudential development,⁴⁶ the classic enunciation of this doctrine is that of Judge Huber in the *Island of Palmas* arbitration. He stated:

a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.⁴⁷

⁴⁵ See, for instance, Judge Huber in the *Island of Palmas case* (United States/Netherlands, 1928), 2 Reports of International Arbitral Awards 829 at 845; also 4 Annual Digest of Public International Law Cases (1927-28) 3 at 4; and 22 American Journal of International Law 867 (1928) at 883; *South West Africa: second phase cases* (Ethiopia v South Africa; Liberia v South Africa), ICJ Reps, 1966, 6, dissenting opinion of Judge Tanaka, 250 at 293-294; *Namibia* advisory opinion, ICJ Rep, 1971, 31-32, paras.52-53; *Western Sahara* advisory opinion, ICJ Reps, 1975, 12, separate opinion of Judge de Castro, 127 at 168-171; and *Aegean Sea continental shelf case*, ICJ Reps, 1978, 3 at 29-32, paras.71-76. For commentary see Georgopoulos T, *Le droit intertemporel et les dispositions conventionnelles évolutives: quelle thérapie contre la vieillesse des traités?*, 108 Revue générale de droit international public 123 (2004); Higgins R, *Some observations on the inter-temporal rule in international law*, in Makarczyk J (Ed), *Theory of international law at the threshold of the 21st century: essays in honour of Krzysztof Skubuszewski* (Kluwer: The Hague: 1996) 173; Jennings and Watts, above n.39 (*Oppenheim's international law*), 1281, §633.11; Lauterpacht H, *The function of law in the international community* (Clarendon Press: Oxford: 1933) 283-25; and Rosenne S, *Developments in the law of treaties* (Cambridge University Press: Cambridge: 1989) 76-80.

⁴⁶ Higgins' analysis addresses both the international and European dimensions of this development - see Higgins, above n.45 (*Inter-temporal rule*), *passim*: for instant purposes, only the international aspects are relevant.

⁴⁷ *Island of Palmas case*, 2 Reports of International Arbitral Awards 845; and 22 American Journal of International Law (1928) 883.

The Inter-Temporal Rule and Self-Determination

A clear distinction is thus drawn between the law regulating the creation or vesting of a right and the law determining its subsequent interpretation. While the criteria for the existence of a right are determined by the law in force at the time it was created or vested, its substantive content does not remain fixed but is dynamic and evolves in accordance with developments in the legal system. Huber further observed:

as regards the...the so-called "inter-temporal" law...a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.⁴⁸

Although the relationship between these passages is uneasy to some degree,⁴⁹ in the *Namibia* advisory opinion, in its consideration of the inter-temporal rule, the International Court held that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation".⁵⁰ If accepted at face value, this ruling possibly goes too far: as Higgins has commented, the Court appears not to have realised that "the inter-temporal issue as it arises for treaties generally is very much more complex."⁵¹ Nevertheless, in the specific context of self-determination, the International Court observed:

52. ...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly

⁴⁸ *Island of Palmas* case, 2 Reports of International Arbitral Awards 845; 4 Annual Digest of Public International Law Cases (1927-28) 4; and 22 American Journal of International Law (1928) 883.

⁴⁹ The most detailed exposition of their relationship is Higgins, above n.45 (*Inter-temporal rule*).

⁵⁰ *Namibia* advisory opinion, ICJ Reps, 1971, 31.

⁵¹ Higgins, above n.45 (*Inter-temporal rule*), 177.

embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence"...

53. ...viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain; as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.⁵²

The International Court of Justice subsequently declared in the *East Timor* case that self-determination is "one of the essential principles of contemporary international law."⁵³ In the *Legal consequences of the construction of a wall* advisory opinion, it not only authoritatively affirmed the entitlement of the Palestinian people to the right of self-determination, ruling that this had also been recognized by Israel,⁵⁴ but also held that self-determination was a right *erga omnes*, whose realization all UN member States, by virtue of General Assembly resolution 2625 (XXV)(24 October 1970),⁵⁵ as well as all States parties to the UN Covenants on

⁵² *Namibia* advisory opinion, ICJ Rep, 1971, 31-32, paras.52-53.

⁵³ *East Timor case* (Portugal v Australia), ICJ Rep, 1995, 90 at 102, para.29.

⁵⁴ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 182-183, para.118.

⁵⁵ In the *Nicaragua case*, the International Court ruled that resolution 2625

Human Rights, have the duty to promote.⁵⁶

The International Law Commission's exegesis of the Court's jurisprudence concludes that self-determination is not simply an obligation *erga omnes* which all States must respect, but also that it has *ius cogens* status. In other words, it is peremptory—States cannot derogate from its exigencies in their international relations.⁵⁷ Doctrine affirms that there is a conceptual connection between the two categories of obligations *erga omnes* and *ius cogens* norms, but does not conclusively affirm their coincidence.⁵⁸ de Hoogh underlines that obligations *erga omnes* are essentially connected with the remedies available to all States following a breach of international law, whereas the notion of *ius cogens* norms places emphasis on their substantive content.⁵⁹ When considering the impact of self-determination on the situation in the Middle East, the primary issue is that of the influence of its substantive content—including all States' duty to promote respect for and realization of this right—rather than the remedies to which they may have recourse following a denial of self-determination.

expressed rules of customary international law – see *Military and paramilitary activities in and against Nicaragua case: merits judgment* (Nicaragua v United States), ICJ Rep, 1986, 14 at 99-100, para.188: see also *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171, para.87.

⁵⁶ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171-172, para.88: see also 199, paras.155-156.

⁵⁷ International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to Article 40 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts*, 112, para.5, available at <<http://untreaty.un.org/ilc/reports/2001/2001report.htm>>; II.ii Yearbook of the International Law Commission (2001), UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), 112, para.5; and also, Crawford J, *The International Law Commission's Articles on State responsibility: introduction, text and commentaries* (Cambridge UP: Cambridge: 2002) 246-247.

⁵⁸ See, for instance, de Hoogh A, *Obligations erga omnes and international crimes* (Kluwer: The Hague: 1996) 53-56, 91; and Ragazzi M, *The concept of international obligations erga omnes* (Clarendon Press: Oxford: 1997) Chapter Three, 182 and 190. See also Scobbie I, *Unchart(er)ed waters?: consequences of the advisory opinion on the Legal consequences of the construction of a wall in the Occupied Palestinian Territory for the responsibility of the UN for Palestine*, 16 European Journal of International Law 941 (2005), 949-952.

⁵⁹ de Hoogh, above n.58 (*Obligations erga omnes*), 53: compare Ragazzi, above n.58 (*Obligations erga omnes*), 203 et seq.

III. CORE CONTENT OF SELF-DETERMINATION

In the *Legal consequences of the construction of a wall* advisory opinion, the Court's elucidation of the implications of the Palestinian people's right to self-determination is rather terse and couched abstractly. This attracted criticism from within the Court itself. For instance, while endorsing the Court's affirmation of the Palestinian people's right to self-determination, Judge Higgins thought it "quite detached from reality for the Court to find that it is the wall that presents a 'serious impediment' to the exercise of this right."⁶⁰ Nevertheless, elsewhere and also in the context of an argument on self-determination, she cautioned against:

the pursuance of a policy of legal deconstructionism—the systematic attempt to empty everything of all substance and meaning. Resolutions must be shown to say nothing. Findings must be shown not to have been made. The substantive rights of others must be shown to amount to nothing more than United Nations procedures that may or may not be invoked, but which have no objective existence of their own.⁶¹

The question is therefore that of identifying the relevant aspects of the "objective existence" of this right.

Like many legal concepts, self-determination designates a core content and an associated, yet integral, bundle of rights and duties. The core content is clear: it entitles peoples to "determine their political status and freely pursue their economic, social and cultural development."⁶² This formula was repeated in General

⁶⁰ *Legal consequences of the construction of a wall* advisory opinion, separate opinion of Judge Higgins, ICJ Rep, 2004, 207 at 214, para.30: see 214-215, paras.28-31.

⁶¹ Professor Higgins, advocate for Portugal, *East Timor case* (Portugal v Australia), Pleadings, CR.1995/13 (13 February 1995), 8, para.1.

⁶² This formulation was employed in operative paragraph 2 of General Assembly resolution 1514 (XV) (15 December 1960), the *Declaration on the granting of independence to colonial countries and peoples*, which consolidated the references to self-determination contained in Articles 1.2 and 55 of the United Nations Charter.

Core Content of Self-Determination

Assembly resolution 2625 (XXV)(24 October 1970), the *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, which is recognized as an authoritative interpretation of the fundamental legal principles contained in the UN Charter. This resolution enumerated the possible political outcomes of the exercise of self-determination, namely:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

The classic formulation of the core content of this right emphasises self-determination as process, that is, the right freely to determine a political status but, following Drew's analysis,⁶³ it must be acknowledged that self-determination has two distinct vectors. In order that the process element have any focus, it must be presupposed that self-determination has a substantive content:

the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people the right of 'free choice' in the absence of more substantive entitlements—to territory, natural resources, etc—would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum. This is both explicit and implicit in the law. For example, implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set of resources...[T]he following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination...: (a) the right to exist—demographically

For an overview of this principle, and its development, see Doehring K, *Self-determination*, in Simma B (Ed), *The Charter of the United Nations: a commentary* (Oxford UP: Oxford: 2002, 2nd edn) 47 *et seq.*

⁶³ Drew C, *The East Timor story: international law on trial*, 12 *European Journal of International Law* 651 (2001).

and territorially—as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.⁶⁴

Key to the exercise of the right of self-determination is territory over which that right may be exercised. As Drew underlines:

Despite its text book characterization as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be “human rights”.⁶⁵

This uncontroversial view also found expression in Palestine’s written statement to the International Court during the *Legal consequences of the construction of a wall* advisory opinion proceedings. Palestine repeatedly spoke of “the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination.”⁶⁶

Similarly, in the *East Timor* case⁶⁷ proceedings, Portugal underlined that self-determination has a territorial basis, and that its exercise simultaneously decides both the destination of the people and of the territory. Portugal described the relationship between the people and the territory as a “principle of individuality.” This entails that the territory which is the basis of the right is legally distinct from any other territory and, moreover, is entitled to territorial integrity. It forms a single unit which must not be dismembered. Further:

un territoire qui constitue l’assise du droit d’un peuple à disposer de lui même...ne peut changer de statut juridique que par un acte d’autodétermination de ce peuple. La

⁶⁴ Drew, above n.63 (*East Timor*), 663: paragraph break suppressed and notes omitted: for a similar affirmation of the substantive core content of self-determination, see Orakhelashvili A, *The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions*, 16 European Journal of International Law 59 (2005), 64.

⁶⁵ Drew, above n.63 (*East Timor*), 663.

⁶⁶ See, eg, *Legal consequences of the construction of a wall* advisory opinion Pleadings, Palestine Written Statement, 239, para.548 and 240, para.549.

⁶⁷ *Case concerning East Timor* (Portugal v Australia), ICJ Rep, 1995, 90.

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Résolution 1541 du 17 décembre 1960 de l'Assemblée générale précise bien cette norme.⁶⁸

Accordingly, regardless of whether the outcome of the exercise of self-determination by the Palestinian people is the emergence of an independent Palestinian State, or integration or association with an existing State, the specific territory in issue lying within the boundaries of Mandate Palestine must be identified. Given the relative nature of claims to territory, affirmed by the Permanent Court in the *Eastern Greenland* case, the evaluation of the two competing claims which may be made to the territory of Mandate Palestine requires an historical examination of proposals for the disposition of this territory, refracted through the prism of international law.

⁶⁸ *East Timor* Pleadings, Portuguese Memorial (18 November 1991), 195, para.7.01: emphasis in quotation suppressed. See also *Legal consequences of the construction of a wall* advisory opinion Pleadings, League of Arab States' Written Statement, 62, para.8.2 and 76, para.8.28.

IV. THE ROLE OF THE UNITED NATIONS IN RELATION TO THE MANDATE FOR PALESTINE

By a letter dated 2 April 1947,⁶⁹ the United Kingdom, invoking Article 10 of the United Nations Charter,⁷⁰ placed the question of Palestine on the agenda of the United Nations General Assembly. The General Assembly's competence to deal with this question was unclear and, indeed, was contested by Arab States.⁷¹ Mandates had formed part of the League of Nations legal system, and the UN Charter provided only for a discretionary transfer of mandated territories to its International Trusteeship System. States, members of the United Nations, which held territories under Mandate were under no obligation to do so. Nevertheless, there was an expectation that this would occur.

⁶⁹ UN Doc. A/286 (3 April 1947).

⁷⁰ Article 10 of the UN Charter provides, "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters." Article 12.1 of the UN Charter provides that while the Security Council is exercising the functions assigned to it by the Charter in relation to any dispute or situation, the General Assembly must not adopt any recommendation regarding that dispute or situation unless requested to do so by the Security Council.

⁷¹ For a summary of the views of the Arab States, see the report of Sub-Committee II of the Ad Hoc Committee on Palestine, UN Doc.A/AC.14/32 (11 November 1947), 5-24. At the time it issued its report, Sub-Committee II was composed entirely of representatives of States, predominantly Arab States, which opposed partition. When the Sub-Committee undertook a preliminary review of its task, it thought it unfortunate that it was constituted to include representatives of only one view on the future of Palestine and proposed that it should be reconstituted to include representatives of States "which had not definitely committed themselves to any particular solution of the Palestine question." Two Arab States were willing to withdraw from the Sub-Committee in order that this could be achieved. This request was refused without explanation—see 2-3, para.3. Uncertainty regarding the competence of the UN was also indicated in contemporary legal commentary, see, eg, Potter PB, *The Palestine problem before the United Nations*, 42 American Journal of International Law 859 (1948); and also Editorial Note, *Termination of the British Mandate for Palestine*, 2 International Law Quarterly 57 (1948).

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A. *THE INTERNATIONAL TRUSTEESHIP SYSTEM*

Chapter XII of the UN Charter (Articles 75-85) sets out the framework for the UN International Trusteeship System which was its corollary of the League's Mandates system. Chapter XIII (Articles 86-91) created the Trusteeship Council, the body charged with the supervision of the administration of Trust Territories. In practical terms, the Trusteeship System ended when the final UN Trust Territory, the Republic of Palau, achieved its independence on 1 October 1994.⁷²

Article 75 of the UN Charter provides:

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 77.1.a expressly envisaged that territories held under Mandate could be transferred to the trusteeship system, but Article 77.2 cautions:

It will be a matter for subsequent agreement as to which territories...will be brought under the trusteeship system and upon what terms.

Under Article 79, the terms of trusteeship agreements were to be agreed by "the States directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations". Further, the agreements were to be approved by the Security Council in the case of territories deemed to be strategic areas (Article 83) and by the General Assembly in all other cases (Article 85). Article 80.1 contained a transitional provision for mandated territories pending the conclusion of trusteeship agreements. This saving clause provides:

⁷² The Security Council subsequently adopted resolution 956/1994 (10 November 1994) which determined that the trusteeship agreement for Palau had terminated: see records of the 3455th meeting of the Security Council, UN Doc.S/PV.3455 (10 November 1994). For commentary on Chapters XII and XIII of the UN Charter, see Cot J-P and Pellet A, *La Charte des Nations Unies* (Economica: Paris: 1991, 2nd edn) 1101 *et seq*; and Rauschnig D, *Chapter XII. The Trusteeship System*, in Simma, above n.62 (*UN Charter*), 1099-1128.

until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

B. UN COMPETENCE IN THE SUPERVISION OF MANDATES

Before the General Assembly adopted resolution 181 (II) on 29 November 1947 (on which see below, Section V), the United Kingdom had made clear that it wished to withdraw from Palestine and terminate the Mandate for Palestine rather than transfer the territory to the International Trusteeship System. Indeed the preamble of resolution 181 expressly records that the General Assembly had met in special session at the request of the United Kingdom to create a special committee in order to prepare for the consideration of the future government of Palestine during the Assembly's second regular session. As noted above, at that time the parameters of the United Nation's, and particularly the General Assembly's, responsibility for mandated territories were unclear, and disputed by Arab States in particular. It was claimed that, with the dissolution of the League, the legal basis for the Mandate for Palestine had disappeared and consequently it had come to an end.⁷³ The United Nations had not succeeded to the League in the administration of Mandates:⁷⁴ only if and when the Mandatory negotiated a Trusteeship Agreement which met with the approval of the General Assembly could any United Nations organ be competent to entertain or recommend any proposals with regard to mandated territory.⁷⁵ The sole solution which the General Assembly was competent to recommend with regard to Palestine was that it should be independent, but the determination of its system of government was a matter solely for the people of

⁷³ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 9, para.12.b and 12, para.15.b.

⁷⁴ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 12, para.15.c.

⁷⁵ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 12, para.16.

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Palestine.⁷⁶ In particular:

The United Nations cannot make a disposition or alienation of territory. Nor can it deprive the majority of the people of Palestine of their territory and transfer it to the exclusive use of a minority in the country.⁷⁷

In sum, it was contended that the Partition Plan envisioned in resolution 181 violated the terms of the Mandate and the principles of the Covenant, as well as principles enshrined in the UN Charter, including that of self-determination.⁷⁸

The extent of the General Assembly's competence in relation to mandated territories was subsequently examined by the International Court of Justice in a series of cases bearing upon South West Africa/Namibia whose administration had been entrusted to South Africa under a Mandate, and which South Africa had refused to transfer to the International Trusteeship System. In its 1950 advisory opinion on the *International status of South West Africa*, the International Court of Justice noted that the resolution adopted by the Assembly of the League of Nations on 18 April 1946 which dissolved the League had stated:

Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:..

3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members

⁷⁶ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 13, para.18.

⁷⁷ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 17, para.23.

⁷⁸ *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, UN Doc.A/AC.14/32 (11 November 1947), 16, para.23: see also 17, para.25.

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of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.

The Court commented:

As will be seen from this resolution, the Assembly said that the League's functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until "other arrangements" were established.⁷⁹

While the dissolution of the League entailed the disappearance of its organs which had exercised a supervisory function over the administration of these territories, this did not have the consequence that the Mandates themselves terminated. The International Court declared that the fundamental nature of Mandates was that:

The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization.⁸⁰

Consequently, sovereignty over mandated territories was not transferred to Mandatory States, nor were these territories ceded

⁷⁹ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 128 at 134.

⁸⁰ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 132: reaffirmed *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 136 at 165, para.70.

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to them.⁸¹ Rather, at the heart of the system:

two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilization".⁸²

As the International Court ruled in 1950, only the Mandate gave the Mandatory State title to exercise authority over the territories they held under Mandate. It rejected a claim made by South Africa that its Mandate over South West Africa had disappeared with the dissolution of the League:

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.⁸³

In other words, the obligations imposed on South Africa by the Mandate in favour of the inhabitants of the territory did not depend on the continued existence of the League or the exercise of supervision by its organs.⁸⁴ Conversely, South Africa's claim that it was lawfully in charge of South West Africa depended solely on the continued existence of the Mandate.

Indeed, Article 80.1 of the UN Charter had expressly preserved the rights accorded to the inhabitants of mandated territories in the period pending the conclusion of a Trusteeship Agreement. This "presuppose[d] that the rights of States and peoples shall not lapse automatically on the dissolution of the

⁸¹ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 132.

⁸² *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 131: reaffirmed *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 165, para.70.

⁸³ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 133: see also *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* advisory opinion, ICJ Rep, 1971, 16 at 41, para.78. The effect of the dissolution of the League on the Mandates system was also examined in the *Namibia* advisory opinion at 32 *et seq.*, paras.55 *et seq.*

⁸⁴ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 133: affirmed *Namibia* advisory opinion, ICJ Rep, 1971, 32-33, para.55.

League of Nations.”⁸⁵ Further, the International Court ruled that “no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.”⁸⁶ The terms of the resolution dissolving the League presumed that its supervisory functions would be assumed by the United Nations:

The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949. For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations.⁸⁷

Mandated territories thus retained their international status as territories held in the sacred trust of civilisation—“an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose.”⁸⁸ A Mandatory State lacked legal competence to modify the international status of the mandated territory unilaterally. The International Court ruled that this had been enshrined in the Mandate itself as Article 7 of the Mandate for South West Africa (and likewise Article 27 of the Mandate for Palestine) expressly provided that the consent of the League Council was required for the modification of the Mandate’s terms.⁸⁹ Although the League

⁸⁵ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 134, see 133-134; see also *Namibia* advisory opinion, ICJ Rep, 1971, 35, para.66.

⁸⁶ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 137.

⁸⁷ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 137.

⁸⁸ *Namibia* advisory opinion, ICJ Rep, 1971, 32, para.55.

⁸⁹ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 141.

As noted above, in accordance with Article 27 of the Mandate for Palestine, the consent of the League Council had been sought and gained in November 1922 when Britain was authorised to divide the territory in two and thus create Transjordan.

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Council had disappeared, the UN Charter set out the proper procedure for modifying the international status of mandated territory, namely its transfer to the International Trusteeship System.⁹⁰ To this end:

Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System.⁹¹

Accordingly, in the normative hindsight provided by the jurisprudence of the International Court, the General Assembly was the body competent to determine the modalities of the termination of the Mandate for Palestine, and the United Kingdom acted correctly in placing this matter on its agenda.

⁹⁰ *International Status of South West Africa* advisory opinion, ICJ Rep, 1950, 141.

⁹¹ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 141-142.

V. UNITED NATIONS PARTITION PLAN FOR PALESTINE

In response to the United Kingdom's announcement that it intended to terminate the Mandate for Palestine, General Assembly resolution 106 (S-I) (15 May 1947) created the UN Special Committee on Palestine which was charged with recommending to the Assembly "such proposals it may consider appropriate for the solution of the problem of Palestine."⁹² A majority of the Committee recommended the partition of Palestine into Jewish and Arab States, which would form an economic union, and that Jerusalem be internationalized.⁹³ On the basis of the Committee's Report, the General Assembly adopted resolution 181 (II) (29 November 1947), Part A of which provides, in part:

The General Assembly...

Recommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below;

Requests that

- (a) The Security Council take the necessary measures as provided for in the plan for its implementation;
- (b) The Security Council consider, if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Articles 39 and 41 of the Charter, to empower the

⁹² General Assembly resolution 106 (S-I) (15 May 1947), operative paragraph 6.

⁹³ See UN Special Committee on Palestine, *Report to the General Assembly*, UN Doc.A/364 (3 September 1947).

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- United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution;
- (c) The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution;
 - (d) The Trusteeship Council be informed of the responsibilities envisaged for it in this plan;

Calls upon the inhabitants of Palestine to take such steps as may be necessary on their part to put this plan into effect;

Appeals to all Governments and all peoples to refrain from taking action which might hamper or delay the carrying out of these recommendations.

Part I of the *Plan of partition with economic union* annexed to the resolution set out a detailed plan for the partition of Palestine into separate Arab and Jewish States which were to form an economic union. Part III.A internationalised Jerusalem and excluded it from both States, providing:

The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations.

Part I.A.1 declared that the Mandate for Palestine should terminate as soon as possible and by 1 August 1948 at the latest. Part I.B detailed the steps which were to be taken preparatory to the independence of the two States, which required the progressive withdrawal of the Mandatory's armed forces from the territory, and the concomitant assumption of administrative powers by a UN Commission, operating through Arab and Jewish Provisional Councils of Government.

The Partition Plan envisaged in resolution 181 was never implemented. The Arab States continued to reject partition,

maintaining that the UN was incompetent to recommend any solution to the situation which would arise on the termination of the Mandate apart from endorsing the independence of Palestine under a governmental structure decided by its inhabitants. The Arab Higher Committee, recognized as the representative of the Arab population of Palestine, declined to participate in the work of the UN Palestine Commission, or to take any action in furtherance of the implementation of resolution 181 and the Partition Plan. In its first monthly progress report to the Security Council, the Palestine Commission noted that while invitations to the Mandatory and Jewish Agency for Palestine to designate representatives to the Commission had been accepted, the Arab Higher Committee had declined to do so. Moreover, the Mandatory had informed the Commission that the Arabs had made it clear that "they proposed to resist with all the forces at their disposal the implementation of the partition plan."⁹⁴ On 6 February 1948, the representative of the Arab Higher Committee, Makhleh, informed the UN Secretary-General that it refused to participate in the work of the Palestine Commission because the United States had placed undue influence, which was "nothing short of political blackmail," on States to vote in favor of resolution 181,⁹⁵ and that any decision taken under pressure, undue influence or duress was null and void.⁹⁶ Furthermore, partition was contrary to the letter and spirit of the UN Charter; accordingly the UN was incompetent to order partition and thus resolution 181 was an *ultra vires* act devoid of legal validity.⁹⁷

By early February, despite knowing that the United Kingdom was determined to withdraw from Palestine on 15 May 1948, the Security Council had still not accepted the responsibilities assigned to it by the General Assembly in resolution 181.⁹⁸ This was despite the fact that the Mandatory had

⁹⁴ UN Palestine Commission, *First monthly progress report to the Security Council*, A/AC.21/7 (29 January 1948), paras.3.d and 7.b.

⁹⁵ UN Palestine Commission, *Statement of 6 February 1948 communicated to the Secretary-General by Mr Isa Makhleh, Representative of the Palestine Higher Committee*, A/AC.21/10 (16 February 1948) 2-4, quotation at 2, para.2.

⁹⁶ UN Palestine Commission, *Statement of 6 February 1948 communicated to the Secretary-General by Mr Isa Makhleh, Representative of the Palestine Higher Committee*, A/AC.21/10 (16 February 1948) 4, para.6.

⁹⁷ UN Palestine Commission, *Statement of 6 February 1948 communicated to the Secretary-General by Mr Isa Makhleh, Representative of the Palestine Higher Committee*, A/AC.21/10 (16 February 1948) 4, paras.7-8.

⁹⁸ See UN Palestine Commission, *Relations between the United Nations*

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informed the Commission that the situation in Palestine had deteriorated rapidly since December. The United Kingdom further cautioned that:

in the present circumstances the Jewish story that the Arabs are the attackers and the Jews the attacked is not tenable. The Arabs are determined to show that they will not submit tamely to the United Nations Plan of Partition; while the Jews are trying to consolidate the advantages gained at the General Assembly by a succession of drastic operations designed to intimidate and cure the Arabs of any desire for further conflict. Elements on each side are thus engaged in attacking or in taking reprisals indistinguishable from attacks. The Government of Palestine fear that strife in Palestine will be greatly intensified when the Mandate is terminated, and that the international status of the United Nations Commission will mean little or nothing to the Arabs in Palestine.⁹⁹

It has been claimed that the Security Council's failure to engage in the implementation of resolution 181 was because this, manifestly, could not be done peacefully but would need to be backed by force, as "No modifications in the essentials of the partition plan are acceptable to the Jewish Agency, and no modifications would make the plan acceptable to the Arab Higher Committee."¹⁰⁰ The Palestine Commission told the permanent members of the Security Council that there was insufficient acceptance of the Partition Plan by the Mandatory and by the Jewish and Arab populations of Palestine to afford a basis for its peaceful implementation, and that the Commission could not discharge its responsibilities on the termination of the Mandate without the assistance of an adequate non-Palestinian armed force to preserve law and order.¹⁰¹ This situation was compounded by

Commission and the Security Council (Working paper prepared by the Secretariat), A/AC.21/13 (9 February 1948), 4, para.B.1: see also the Appendix, 12-13.

⁹⁹ UN Palestine Commission, *First monthly progress report to the Security Council*, A/AC.21/7 (29 January 1948), para.7.

¹⁰⁰ Security Council, *Report of its 270th meeting*, S/PV.270 (19 March 1948), statement of Austin (United States' representative), presenting the conclusion of consultations held between permanent members of the Security Council pursuant to Security Council resolution 42 (III) (5 March 1948)—the UN website version of this document was used: it is unpaginated.

¹⁰¹ Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948),

the fact that, given the Arab rejection of the Partition Plan, there was no possibility of forming a provisional council of government for the proposed Arab State by 1 April 1948. Further, although preliminary steps had been taken for the formation of the Jewish council, it would be unable to fulfil its functions under the Partition Plan before the termination of the Mandate.¹⁰² The United Kingdom was adamant that its forces would be withdrawn, the United States was unwilling to commit troops to enforce the resolution,¹⁰³ and it was clear that withdrawal of the Mandatory's armed forces would only result in increasing violence and disorder.¹⁰⁴

In the light of these circumstances, the United States proposed that a temporary trusteeship for Palestine should be established to allow the parties to reach agreement on its future government, which would be without prejudice to the character of the eventual political settlement. It suggested that the Security Council recommend this solution to the General Assembly and to the Mandatory and, in the meantime, instruct the Palestine Commission to suspend its efforts to implement the Partition Plan.¹⁰⁵ This met with a mixed response: while China supported the United States' proposal, the Soviet Union proved hostile, and Rabbi Silver, the representative of the Jewish Agency, thought that the suggested suspension of the implementation of resolution 181 was "a shocking reversal" of the United States' earlier position. He

statement of Austin (United States' representative)—the UN website version of this document was used: it is unpaginated. See also Liang YL, *Notes on legal questions concerning the United Nations*, 42 *American Journal of International Law* 649 (1948) 654.

¹⁰² Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948), statement of Austin (United States' representative), reporting the conclusions of the Palestine Commission.

¹⁰³ See Cohen MJ, *Truman and Palestine, 1945-1948: revisionism, politics and diplomacy*, 2 *Modern Judaism* 1 (1982) 11-15, 17; Liang, above n.101 (*Notes on legal questions*), 652; and Slonim S, *United States policy on Jerusalem, 1948*, 45 *Catholic University Law Review* 813 (1995-1996) 815.

¹⁰⁴ See UN Palestine Commission, *Relations between the United Nations Commission and the Security Council (Working paper prepared by the Secretariat)*, A/AC.21/13 (9 February 1948), 7, para.B.7.c; Security Council, *Report of its 270th meeting*, S/PV.270 (19 March 1948), statement of Austin (United States' representative).

¹⁰⁵ Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948), statement of Austin (United States' representative): see also Bergman E, *Unexpected recognition: some observations on the failure of a last-gasp campaign in the US State Department to abort a Jewish State*, 19 *Modern Judaism* 133 (1999); and Cohen, above n.103 (*Truman and Palestine*), 11-15.

stated:

the decision of the General Assembly remains valid for the Jewish people. We have accepted it and we are prepared to abide by it. If the United Nations Palestine Commission is unable to carry out the mandates which were assigned to it by the General Assembly, the Jewish people of Palestine will move forward in the spirit of that resolution and will do everything which is dictated by considerations of natural survival and by considerations of justice and historic rights.¹⁰⁶

Subsequently, by resolution 44 (III) (1 April 1948), the Security Council requested the Secretary-General to convene a special session of the General Assembly “to consider further the question of the future government of Palestine,” during the course of which the General Assembly adopted resolution 186 (S-2) (14 May 1948). This provided for the appointment of a UN mediator in Palestine and its final operative paragraph relieved “the Palestine Commission from the further exercise of responsibilities under resolution 181 (II) of 29 November 1947.”¹⁰⁷ Accordingly, the Partition Plan was abandoned and not implemented by the United Nations: as a consequence, the Palestine Commission subsequently adjourned itself *sine die*.¹⁰⁸ On the same day that the General Assembly placed the Palestine Commission into abeyance, the Provisional Council of Government declared the independence of Israel,¹⁰⁹ and the Mandate terminated at midnight. As one commentator pithily observed, “Israel was born in an informal manner” and “came into existence, by its own act”.¹¹⁰

¹⁰⁶ Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948); at a subsequent Security Council meeting held on 24 March 1948, the representatives of Canada and France were ambivalent about the United States’ temporary trusteeship proposal, see Liang, above n.101 (*Notes on legal questions*), 654-655.

¹⁰⁷. See also Liang, above n.101 (*Notes on legal questions*), 656.

¹⁰⁸ UN Palestine Commission, *Summary record of its 76th meeting*, A/AC.21/SR.76 (21 May 1948).

¹⁰⁹ *Declaration of the Establishment of the State of Israel*, 1 Laws of the State of Israel 3: see also Crawford, above n.16 (*Creation of States*), 425-434; and Freudenheim Y, *Government in Israel* (Oceana: Dobbs Ferry: 1967) 5-7.

¹¹⁰ O’Connell DP, *State succession in municipal law and international law. Volume II: International relations* (Cambridge UP: Cambridge: 1967) 152 and 155.

VI. NORMATIVE IMPLICATIONS OF GENERAL ASSEMBLY RESOLUTION 181

In principle, General Assembly resolution 181 could not in itself constitute a definitive disposition of the territory of Mandate Palestine into Arab and Jewish States as, by virtue of Article 10 of the UN Charter, the General Assembly has only the power to make recommendations. This is apparent on the very face of resolution 181 which states that the General Assembly: “*Recommends* to the United Kingdom...and to all other Members of the United Nations the adoption and implementation...of the Plan of Partition.”

In the case of resolution 181, however, a distinction should be drawn between the end sought and the means employed. As the International Court ruled in the *Namibia* advisory opinion, although the General Assembly in principle is vested only with recommendatory powers, it is not precluded from adopting resolutions which make determinations or which have operative design in some cases which fall within its competence.¹¹¹ It is generally accepted that, at most, resolution 181 endorsed or acquiesced in the United Kingdom’s desire to terminate the Mandate:

the only legal effect of the partition resolution of itself (apart from the consequences which might have flowed from its *acceptance* by both Jews and Arabs, which would surely have rested on a consensual basis rather than on the authority of the General Assembly) was to indicate concurrence with the termination of the Mandate.¹¹²

Moreover, a clear analogy may be drawn with the termination of Trusteeship Agreements. In the *Northern Cameroons* case, the

¹¹¹ *Namibia* advisory opinion, ICJ Rep, 1971, 50, para.105.

¹¹² Munkman ALW, *Review of Lauterpacht, “Jerusalem and the Holy Places”*, 43 British Yearbook of International Law 306 (1968-69) 308, emphasis in original: see also Crawford, above n.16 (*Creation of States*), 430-431; and Lauterpacht E, *Jerusalem and the Holy Places* (Anglo-Israel Association: London: 1968) 16 and 20-21.

International Court ruled that the General Assembly's resolution terminating the Trusteeship Agreement in relation to Northern Cameroons had a definitive effect for States which were not parties to that Agreement.¹¹³

In contrast, in terms of the means employed to secure this end, namely the procedure employed to secure termination and order government in its aftermath, the General Assembly only possessed powers of recommendation.¹¹⁴ This was the advice given to the Jewish Agency for Palestine before the adoption of resolution 181 by Professor Hersch Lauterpacht.¹¹⁵ Subsequently, following his election as a judge of the International Court of Justice, he elaborated this point in the specific context of the Mandates/Trusteeship system within the constitutional framework of the United Nations. In the *South West Africa—voting procedure* advisory opinion, he declared:

Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres, it may be said, by way of a broad generalisation, that they are not legally binding upon the Members of the United Nations. In some matters—such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses—the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on

¹¹³ See *Northern Cameroons case: preliminary objections judgment* (Cameroon v United Kingdom), ICJ Rep, 1963, 15 at 32-36.

¹¹⁴ See Brownlie I, *Principles of public international law* (Oxford UP: Oxford: 2003, 6th edn)163-164; Crawford, above n.16 (*Creation of States*), 431; Eagleton C, *Palestine and the constitutional law of the United Nations*, 42 *American Journal of International Law* 397 (1948) 397; Elaraby N, *Some legal implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, 33 *Law and Contemporary Problems* 97 (1968) 102-103; Lauterpacht, above n.112 (*Jerusalem*), 16, 20-21; and Liang, above n.101 (*Notes on legal questions*), 653.

¹¹⁵ See Lauterpacht H, *The United Nations General Assembly—voting and competence in the Palestine question*, in Lauterpacht, above n.40 (*Collected papers: Volume III*), 504 at 506.

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proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.¹¹⁶

He specifically pointed out that this was true of recommendations addressed by the General Assembly to States administering Trust Territories, noting that "States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged."¹¹⁷ Nevertheless, although General Assembly resolutions were not legally binding, this did not mean that they lacked all persuasive force:

The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision.¹¹⁸

In relation to resolution 181, not only had the Partition Plan been rejected by the Arab Higher Committee, but it had also been rejected by its specific addressee, the United Kingdom acting in its capacity as the mandatory power for Palestine, as it had refused to implement it. The representative of the United Kingdom stated to the Palestine Commission that the United Kingdom government:

will endeavour to give the Commission the benefit of their experience and knowledge of the situation in Palestine, subject always to their decision that they are unable to take part in the implementation of the United Nations plan. That is, of course, in accordance with the statement made originally to the General Assembly by the Colonial

¹¹⁶ *South West Africa—voting procedure* advisory opinion, ICJ Rep, 1955, 67, separate opinion of Judge Lauterpacht, 90 at 115.

¹¹⁷ *South West Africa—voting procedure* advisory opinion, ICJ Rep, 1955, 67, separate opinion of Judge Lauterpacht, 116.

¹¹⁸ *South West Africa—voting procedure* advisory opinion, ICJ Rep, 1955, 67, separate opinion of Judge Lauterpacht, 118-119: quotation at 119.

Normative Implications of General Assembly Resolution 181

Secretary to the effect that we could not alone implement any plan not accepted by both sides; and that as regards joining in any implementation, that would depend on two conditions. The Commission will remember that one was the inherent justice of the plan, and the other was the degree of force requisite for its implementation.¹¹⁹

Implementation of the Partition Plan also came to be abandoned by the United States, the Security Council and the General Assembly: in the end, only the Jewish Agency tenaciously adhered to it.¹²⁰ As Elihu Lauterpacht has observed:

resolutions of the General Assembly do not normally create legal obligations for the members of the UN (even if Israel and the proposed Arab State had been members at that time, which they were not)...The Assembly could not by its resolution give the Jews and the Arabs in Palestine any rights which either did not otherwise possess: nor, correspondingly, could it take away such rights as they did possess.¹²¹

On 14th May, only hours before the Mandate officially expired, the General Assembly voted to relieve the Palestine Commission of the further exercise of its responsibilities under resolution 181.¹²² Although unsure of the legal situation the adoption of resolution 554 created, the Palestine Commission in its final meeting agreed that resolution 181 itself had not thereby been rescinded and that it should therefore consider that it was not dissolved, but required to adjourn *sine die*.¹²³

¹¹⁹ UN Palestine Commission, *First monthly progress report to the Security Council*, A/AC.21/7 (29 January 1948), para.8.iv.

¹²⁰ See the statement of Rabbi Silver, Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948) above, text to n.106.

¹²¹ Lauterpacht, above n.112 (*Jerusalem*), 16.

¹²² General Assembly resolution 186 (S-2) (14 May 1948), operative section III

¹²³ UN Palestine Commission, *Summary Record of the Seventy-Sixth Meeting*, A/AC/.21/SR.76 (17 May 1948), p. 6

VII. ISRAELI AND PALESTINIAN ARAB ATTITUDES TO RESOLUTION 181

As the question of title to the territory of Mandate Palestine is one of the competing strength of titles of both Israel and the projected Arab State, initially this calls for an examination of the attitudes of both to resolution 181 in their public acts.

One thing common to both is that neither was a member of the United Nations at the time the General Assembly adopted resolution 181. Its terms therefore should be seen as a *res inter alios acta*—an action by a third party which did not bind these two parties.¹²⁴ The implications of resolution 181 were, however, discussed in connection with Israel's admission to the United Nations in 1948 and 1949. These debates were preoccupied by concerns regarding the status of Jerusalem, although the question of the location of Israel's boundaries also arose.¹²⁵ Nevertheless, inasmuch as resolution 181 terminated the Mandate, this did have conclusive effect. The Arab and Jewish populations were not themselves party to the Mandate, and its termination was a matter for the competent actors, namely the United Kingdom as Mandatory and the General Assembly as functional successor to the League of Nations.

A. ISRAELI ATTITUDES TO RESOLUTION 181

Leaving to one side the Arab population's rejection of resolution

¹²⁴ In the law of treaties, the governing principle is that a treaty cannot create rights or obligations for third States which are not parties to that treaty without their consent, see Articles 35-37 of the 1969 Vienna Convention on the Law of Treaties. This Vienna Convention simply restates customary international law on this matter, see, for example, McNair A, *The law of treaties* (Clarendon Press: Oxford: 1961) Chapter XVI. Moreover, this is a principle applicable to international instruments generally. Although a General Assembly resolution is not a treaty, the UN Charter is alien to entities which are not members of the United Nations: acts taken under its auspices cannot impose obligations on non-members.

¹²⁵ This issue will be considered in greater depth in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

181 for the moment, the attitude expressed in official Israeli acts should be considered, bearing in mind that its terms were hortatory rather than mandatory. Resolution 181 simply “*Call[ed] upon* the inhabitants of Palestine to take such steps as may be necessary on their part to put this plan into effect.”

When the United States suggested to the Security Council that Mandate Palestine be placed under a temporary trusteeship, Rabbi Silver, the representative of the Jewish Agency, claimed that it thought that the Partition Plan remained valid and stated that “the Jewish people of Palestine will move forward in the spirit of that resolution.”¹²⁶ The Declaration of the Establishment of the State of Israel, which did not define the boundaries of the State, duly relied, in part, on resolution 181 to base its claim of legitimacy. It proclaimed in its preamble:

On the 29th November 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of the resolution. This recognition of the right of the Jewish people to establish their State is irrevocable.¹²⁷

Although the International Court asserted that “Israel proclaimed its independence on the strength” of resolution 181,¹²⁸ doctrine has tended to disregard this genetic view of resolution 181. For example, Lauterpacht argues that it was not a “title-deed to the territory of a new Jewish State (or for that matter to a new Arab State...),” but claims that it was not devoid of legal relevance as in it the General Assembly indicated the contours of the proper political

¹²⁶ Security Council, *Report of its 271th meeting*, S/PV.271 (19 March 1948).

¹²⁷ I Laws of the State of Israel 3 at 4. The Israel Supreme Court interpreted the Declaration of Independence as affirming the fact of the formation of Israel for the purposes of international recognition, but ruled that it contained no element of constitutional law which could determine the legal validity of laws and ordinances of the State—see *Zvi Zeev v Acting District Commissioner of the Urban Area of Tel Aviv (Yehoshua Gubernik) and another*, 1 Selected Judgments of the Supreme Court of Israel 68 (1948-1953) 71-72; also reported, as *Ziv v Gubernik and others*, at 15 International Law Reports 7. In a subsequent case, *Ahmed Shanki el Kharbutli v Ministry of Defence*, *ibid*, the Supreme Court affirmed *Zvi* and clarified that the Declaration had not simply been a political act but rather had “the force of law for the purpose of establishing the fact of the legal creation of the State”.

¹²⁸ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 166, para.71.

future of the territory.¹²⁹ Crawford, on the other hand, argues that resolution 181 was irrelevant to the creation of Israel as it “was not created either pursuant to an authoritative disposition of the territory, or to a valid and subsisting authorization.”¹³⁰ In Crawford’s view, Israel’s title to its territory lay in its successful secession from the greater territory of Mandate Palestine during 1948-49. He argues that Israel’s territory constituted the area delimited by the 1949 Armistice Agreements (see below Section VIII) and not merely that assigned to the projected Jewish State by resolution 181.¹³¹ Shany also disregards resolution 181 as legally irrelevant, arguing that even if it had been intended to be dispositive at the time of its adoption, it subsequently became a legal nullity.¹³² Shany bases Israel’s title to territory in the Mandate itself, and in particular the directive that the Mandatory implement the terms of the Balfour Declaration and create a national home for the Jewish people.¹³³ Consequently:

the termination *de facto* of the Mandate in 1948 should, by implication, validate the creation of such a national home in all areas effectively controlled by the nascent State of Israel. In other words, the Mandate, which the Partition Resolution did not revoke, could be said to have given the Jewish State right of the way in controlling Palestine after its termination. Hence, one might argue that any Palestinian State established after 1947 should have seceded from Israel, and not *vice versa*.

The question who seceded from whom might have important consequences for determining title to Palestinian land...if the burden was on Palestine to justify unilateral secession from Israel, its boundaries might be limited only to areas lawfully seized from Israel in 1948-49. This may include areas not physically controlled by the Jewish State in 1949, but may exclude areas controlled by Jews prior to 1948 and occupied by the invading Arab

¹²⁹ Lauterpacht, above n.112 (*Jerusalem*) 19.

¹³⁰ Crawford, above n.16 (*Creation of States*) 432: see 430-434: see also Rosenne, above n.37 (*Israel’s Armistice Agreements*) 47-48.

¹³¹ Crawford, above n.16 (*Creation of States*), 434.

¹³² See Shany Y, *Legal entitlements, changing circumstances and inter-temporal: a comment on the creation of Israel and the status of Palestine* (unpublished: 2006), Section III.

¹³³ Shany, above n.132 (*Legal entitlements*), Section II.

army in 1948 (eg, the Jewish Quarter in East Jerusalem, the Gush Ezion area in the Southern West Bank and Kfar Darom in the Gaza Strip).¹³⁴

Shany's thesis thus grants presumptive title to all of Mandate Palestine to Israel, on the ground that its creation was the intended consequence of the Mandate,¹³⁵ but this was not the position adopted by Israel at the time it became independent. Israel consistently did not lay claim to all of this territory but rather, at least at the outset, only to those areas allotted to the Jewish State by virtue of resolution 181.

For example, during its 293rd meeting (17 May 1948), the Security Council discussed a proposal introduced by the United States that a questionnaire should be sent to the disputant parties in Palestine. In the course of this discussion, El-Khoury, the representative of Syria, noted that the Security Council had not agreed that the Partition Plan should be implemented, and that this had been abandoned by the General Assembly. He posed the question of the legal basis upon which the Jewish authorities had established the State of Israel.¹³⁶ At the next meeting, Eban, representing the Jewish Agency for Palestine, replied:

The Provisional Government of the State of Israel is the only *de facto* recognized governmental authority operating in respect of the Jewish inhabitants of the territory of the former Palestine Mandate, and it claims and exercises jurisdiction within the areas assigned to the Jewish State by the resolution of the General Assembly 181 (II) of 29 November 1947.

...the only definite area of jurisdiction which the Jewish inhabitants of the former mandated Territory of Palestine recognize, is the area accepted as having been assigned to the Jewish State by the resolution of the General Assembly of the United Nations on 29 November.

¹³⁴ Shany, above n.132 (*Legal entitlements*), Section IV, text surrounding note 54.

¹³⁵ The view that Israel's existence is based in the Mandate is shared by, for example, Gruhin, Rostow and, implicitly, by Blum: see Gruhin MI, *Jerusalem: legal and political dimensions in a search for peace*, 12 Case Western Reserve Journal of International Law 169 (1980) 188-189; Rostow EV, "Palestinian self-determination": possible futures for the unallocated territories of Mandate Palestine, 5 Yale Studies in World Public Order 147 (1978-1979) 169 and 170; and Blum, above n.12 (*Jerusalem*), 7.

¹³⁶ SCOR, 293rd meeting (17 May 1948), S P/V.293, 17.

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Within that area, the Provisional Government of the State of Israel is the *de facto* recognized governmental authority, and within that area the Jews are in a majority.¹³⁷

Israel clearly based its title to the territory upon which it had been established on resolution 181. This view was explicitly affirmed by some other States;¹³⁸ for example, by Cuba which stated that which saw resolution 181 as "Israel's birth certificate in that it legalized the existence of Israel, a State which would otherwise be a product of force and territorial conquest and could not be recognized by the General Assembly."¹³⁹

Reliance on resolution 181 to establish its title to territory was Israel's constant refrain before the Security Council and the General Assembly, whether the latter was sitting in plenary session or as its First Committee (which is a committee of the whole). For instance, it replied to the Security Council questionnaire which asked which areas were under its control in the following terms:

The Provisional Government of Israel actually exercises control at present over the entire area of the Jewish State, as defined in the resolution of the General Assembly of 29 November 1947. In addition, the Provisional Government is now exercising control over the city of Jaffa; northwestern Galilee...up to the Lebanese frontier, a strip of territory alongside the road from Hulda to Jerusalem; almost all of the Jewish Quarter within the walls of the Old City of Jerusalem. The above areas outside the territory of the State of Israel are under the control of the military authorities of the State of Israel, who are strictly adhering to international regulations in this regard.

The answer continued that while the Provisional Government operated "in parts of Palestine outside the territory of the State of Israel" which, with the exception of Jerusalem, had formerly

¹³⁷ SCOR, 294th meeting (18 May 1948), S P/V.294, 6-7.

¹³⁸ The principal proponent of this view in the relevant Security Council debates was the USSR: see, for example, Malik, representative of the USSR, SCOR, 383rd meeting (2 December 1948), S P/V.383, 22; 384th meeting (15 December 1948), S P/V.384, 20; and 386th meeting (17 December 1948), S P/V.386, 28 and 32.

¹³⁹ Zaydin, representative of Cuba, 207th Plenary meeting (11 May 1949), GAOR, Third Session, Part II, 328.

contained Arab majorities, these areas had “mostly been abandoned by their Arab population.”¹⁴⁰ Consequently:

Whenever such phrases occur as “the frontiers of the State of Israel” or “the territory of the State of Israel”, the reference is to the area outlined in the map appended to the resolution of 29 November 1947, as constituting the area assigned to the Jewish State.¹⁴¹

This position was subsequently repeated before the First Committee of the General Assembly where Israel argued that it had acquired rights under resolution 181, because that instrument was legally binding and, in particular, it claimed full rights over all the territory that resolution 181 had assigned to Israel.¹⁴² Similarly, immediately following Israel’s admission to the United Nations, Sharett, its foreign minister, stated in the plenary General Assembly that resolution 181 was “the historic resolution providing for the establishment of the Jewish State.”¹⁴³ Resolution 181 has recently resurfaced in official Israeli political discourse. On 30 June 2009, Deputy Foreign Minister Ayalon, in explaining

¹⁴⁰ SCOR, 301st meeting (22 May 1948), S P/V.301, 9: footnote omitted in principal quotation.

¹⁴¹ SCOR, 301st meeting (22 May 1948), S P/V.301, 9-10. In contrast, on 14 May 1948, shortly before Israel proclaimed independence, during the Third Session of the People’s Council (which subsequently became the Provisional Council of State), it was asked why the draft Declaration of Independence did not refer to the Partition Plan boundaries. Ben Gurion replied that this had been discussed as it had been proposed that the boundaries be fixed, but that this had met with opposition:

We have decided *to evade* (and I deliberately use this term) this question, for a simple reason: if the UN will stand by its resolutions and obligations, will preserve the peace, will prevent bombardments and will carry out by its own force its decisions, we on our part...will respect all these resolutions. So far the UN has done nothing of the kind and this burden has fallen on us. Therefore, not everything is binding on us and we have left the matter open. We have not said “no UN boundaries”; we have not said the opposite either. We have left the matter open for future developments.

See Blum, above n.12 (*Jerusalem*), 10-11: emphasis in original.

¹⁴² See the statements of Eban, representative of the Provisional Government of Israel, 208th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 711, and 219th meeting of the First Committee (1 December 1948), GAOR, Third Session, Part I, 832-833.

¹⁴³ Assembly, 207th Plenary meeting (11 May 1949), GAOR, Third Session, Plenary Meetings Part II, 332.

Israel's demand that Palestinians should expressly recognise Israel as a Jewish State, said that the:

international community as reflected by United Nations resolution 181 of November 29th, 1947 also recognised Israel as a Jewish State. In fact that was the Partition Plan that called for partitioning the Holy Land for two States, a Jewish State and an Arab State. We, the Jews, accepted, the Arabs did not, and the rest unfortunately is history.¹⁴⁴

In this statement, Ayalon also categorised the creation of Israel as the exercise of the Jewish people's right to self-determination.

Israeli courts have also emphasised the importance of resolution 181. In *Attorney-General of Israel v El-Turani*,¹⁴⁵ the accused was charged with offenses which allegedly had been committed within a demilitarized zone created pursuant to Article 5 of the 1949 Israel-Syria General Armistice Agreement. This zone was situated entirely on the western (i.e. Israeli) side of what had formerly been the international frontier between Syria and Mandate Palestine and, under resolution 181, had been included within the territory of the proposed Jewish State. The accused argued that this demilitarized area could not be regarded as part of Israel, and thus Israeli courts could not exercise jurisdiction over alleged offences committed there. This plea was rejected by the District Court of Haifa. In discussing the status of the zone, Justice Landau ruled that the authors of the Declaration of Independence had relied on two elements to justify its promulgation, namely the historic claim of the Jewish people and resolution 181.¹⁴⁶ He then cited the *Area of Jurisdiction and Powers Ordinance 1948*, section 1 of which provided:

Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area, including both the area of the State of Israel and any part of

¹⁴⁴ Transcript at

<www.mfa.gov.il/MFA/About+the+Ministry/Deputy_Foreign_Minister/Speeches/Dep_FM_Ayalon_recognizing_Israel_Jewish_state_30-Jun-2009.htm?DisplayMode+print>, also available at <www.youtube.com/watch?v=OwNh3oaXvOE>. The legal implications of this call for recognition will be examined in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

¹⁴⁵ 18 International Law Reports 164, District Court of Haifa.

¹⁴⁶ Opinion of Landau J, 18 International Law Reports 165 at 166.

Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel.¹⁴⁷

Landau claimed that, in enacting this ordinance the legislator had in mind the area assigned to the Jewish State by resolution 181, to which were added the areas it occupied after the Declaration of Independence. This created the new territorial unit in which the law of the State of Israel applied. He continued:

The State of Israel includes, therefore, at least the territories allocated to it under the United Nations decision. Those areas include the demilitarized zone...
...From the point of view of international law, the demilitarized zone is included within the Partition Resolution, which is a document having validity under international law. The State of Israel has never renounced its sovereignty over the demilitarized zone. The General Armistice Agreement between Israel and Syria imported no change.¹⁴⁸

Landau's opinion was subsequently upheld and affirmed by the Israel Supreme Court.¹⁴⁹

Although both Landau and the Declaration of Independence perhaps overstated the normative weight of resolution 181, it is apparent that Israel's public acts in the period immediately after independence were predicated on the acceptance of some form of partition of the territory of Mandate Palestine. Rosenne described the situation as one of "the partition of the country and the establishment of the independent State of Israel, in partial accord with the terms of a recommendation of the General Assembly."¹⁵⁰

¹⁴⁷ For the official translation of the *Area of Jurisdiction and Powers Ordinance*, see 1 Laws of the State of Israel 64. By virtue of section 3, this ordinance was given retroactive effect to 15 May 1948. Section 1 was also cited by Israel's Supreme Court in *Wahib Saleh Kalil v Attorney-General*, 16 International Law Reports 70-71.

¹⁴⁸ *Attorney-General of Israel v El-Turani*, Haifa District Court, opinion of Landau J, 18 International Law Reports 167.

¹⁴⁹ See *Attorney-General of Israel v El-Turani*, Israel Supreme Court, opinion of Vitkon J, 18 International Law Reports 168 at 169.

¹⁵⁰ Rosenne S, *The effect of change of sovereignty upon municipal law*, 27 British Yearbook of International Law 267 (1950) 272. At the time this article was published, Rosenne was the Legal Adviser to the Israeli Ministry for Foreign Affairs.

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Thus, while Landau stressed that the demilitarized zone was included within the territory allocated to the Jewish State by resolution 181 and that Israel had not renounced sovereignty over it, a different approach was taken regarding the exercise of criminal jurisdiction over other areas. For example, the Partition Plan had envisaged that Jerusalem would be under international control. In *Attorney-General for Israel v Sylvester*, in order to prosecute offences which had been committed in areas of Jerusalem which had fallen under the control of Israeli armed forces,¹⁵¹ the Supreme Court relied on the occupant's legislative powers under Article 43 of the 1907 Hague Regulations.¹⁵² In addition, Israeli courts repeatedly ruled that the territory of the State of Israel was not coterminous with that of Mandate Palestine. For instance, in 1950 the Supreme Court ruled in *Shimson Palestine Portland Cement Factory Ltd v Attorney-General*:

The territory of the State of Israel does not coincide with all the territory under the former Mandate.¹⁵³

Further, despite express provision in resolution 181 for the succession to treaties to which Palestine had been a party, and to all financial obligations assumed on behalf of Palestine by the United Kingdom, Israel consistently denied that it was the successor to the Government of Mandate Palestine.¹⁵⁴ This view

¹⁵¹ See *Attorney-General for Israel v Sylvester*, 15 International Law Reports 573, Israel Supreme Court, opinion of Smoira CJ at 575: see also *Wahib Saleh Kalil v Attorney-General*, 16 International Law Reports 70, Israel Supreme Court. Moreover, responsibility for the assassination of the United Nations mediator, Count Folke Bernadotte, in Jerusalem on 17 September 1948 was attributed to the Israeli government because this took place in territory under occupation by Israeli forces—see Wright Q, *Responsibility for injuries to United Nations officials*, 43 American Journal of International Law 95 (1949).

¹⁵² Article 43 of the Regulations respecting the Laws and Customs of War on Land, annexed to 1907 Hague Convention IV provides: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

¹⁵³ Opinion of Dunkelblum J, 1 Selected Judgments of the Supreme Court of Israel 290 (1948-1953), 291 at 296 and 297, also reported 17 International Law Reports 72 (see 77): see also *Albohar v Attorney-General*, Appeal Tribunal for the Reinstatement of Ex-Servicemen in their Previous Employment, 17 International Law Reports 94; *Pales Ltd v Ministry of Transport*, 22 International Law Reports 113, Israel Supreme Court, opinion of Silberg J, 117 at 118.

¹⁵⁴ See Alexander CH, *Israel in fieri*, 4 International Law Quarterly 423 (1951)

was repeatedly affirmed by Israeli courts:

The State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government. The new State came into being as a result of the decision and the Declaration of the Provisional Government of Israel, as an independent State which neither received nor took over the authority of the Government of Palestine. The Mandatory Government left the country without transferring its authority to any other body. Furthermore, the State of Israel was established in only part of the territory which was formerly known as the mandated territory. There is no legal nexus having its origin either in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel.¹⁵⁵

Essentially, Israel adopted an ambiguous approach to resolution 181. While claiming to benefit from it in relation to territorial claims, Israel rejected other aspects of the resolution, for instance, in relation to succession to treaties and debts, but also in relation to the territorial entitlement of the proposed Arab State. Nevertheless, Israel's adherence to the claims that its territory did

427-429; O'Connell DP, *State succession in municipal law and international law. Volume I: Internal relations* (Cambridge UP: Cambridge: 1967) 431-433 (financial obligations) and above n.110 (*Volume II: International relations*), 248-250 (water allocation treaties); and also Rosenne, above n.150 (*Change of sovereignty*), 267-268. Financial questions between the United Kingdom and Israel were finally settled by the bilateral 1950 Agreement for the Settlement of Financial Matters Outstanding as a Result of the Termination of the Mandate for Palestine, and related exchanges of letters, 1951 United Nations Treaty Series 232, No.1162. This agreement was only binding on the States parties and did not confer rights on individuals, see *Association for the Protection of Palestine Government Bondholders v Minister of Finance of Israel*, Israel Supreme Court, 18 International Law Reports 398.

¹⁵⁵ *Albohar v Attorney-General*, Appeal Tribunal for the Reinstatement of Ex-Servicemen in their Previous Employment, 17 International Law Reports 94: see also *Pales v Ministry of Transport*, Haifa District Court, 17 ibid 79 at 80, Israel Supreme Court, 22 ibid 113, opinion of Cheshin Deputy CJ 114 at 115 and 116, and opinion of Silberg J, 117 at 119 and 121; *Shimson Palestine Portland Cement Factory Ltd v Attorney-General*, 17 ibid 72, Israel Supreme Court, opinion of Dunkelblum 73 at 74, and at 1 Selected Judgments of the Supreme Court of Israel 290 (1948-1953) 292; *Attorney-General v Levitan*, Tel Aviv District Court, 18 International Law Reports 64 at 65; and *Khayat v Attorney-General*, Haifa District Court, 22 ibid 123 at 125.

not coincide with that of Mandate Palestine and that it was not successor to its government preclude any claim that it possesses legal title to all of the territory of Mandate Palestine.

B. ARAB ATTITUDES TO RESOLUTION 181

It must be borne in mind that the rejection by the Palestinian Arab population and Arab States of the Partition Plan contained in resolution 181 was the rejection of a recommendation of the General Assembly whose implementation was ultimately abandoned by the Assembly itself when it voted to relieve the Palestine Commission of the further exercise of its responsibilities. There was also contemporary legal uncertainty surrounding the General Assembly's powers in relation to the Mandate for Palestine because it had not been transferred into the United Nations Trusteeship System. In this light, the rejection of the Partition Plan by the Palestinian Arab population (as well as by various States) was, to employ Judge Lauterpacht's standard, done in good faith because reasons were given for that rejection. These reasons were, moreover, legal reasons which denied the competence of the General Assembly and claimed that partition was incompatible with Charter principles, including self-determination.¹⁵⁶

Although the Palestinian Arab population and Arab States rejected the Partition Plan as such, a claim to the territory of Mandate Palestine was nevertheless maintained, and was presented as a claim to self-determination. As the Report of Sub-Committee II of the Ad Hoc Committee on Palestine declared:

The imposition of the partition of Palestine against the expressed wishes of the majority of its population can in no way be considered as respect for, or compliance with, any of the principles of the Charter mentioned above [which included self-determination].¹⁵⁷

In the General Assembly debates immediately following Israel's admission to the United Nations, Israel's foreign minister

¹⁵⁶ See UN Palestine Commission, *Statement of 6 February 1948 communicated to the Secretary-General by Mr Isa Makhleh, Representative of the Palestine Higher Committee*, A/AC.21/10 (16 February 1948), and *Report of Sub-Committee II of the Ad Hoc Committee on Palestine*, A/AC.14/32 (11 November 1947).

¹⁵⁷ A/AC.14/32 (11 November 1947), 16, para.24.

Sharett observed that, on the termination of the Mandate, Israel had “claimed the right of self-determination.”¹⁵⁸ This, at least in part, echoed earlier statements made by Malik, the representative of the USSR. Before the Security Council, he had argued that the General Assembly’s decision in resolution 181 to establish two independent States in the territory of Mandate Palestine had corresponded:

To the fundamental national interests of both the Jewish and Arab peoples in Palestine, both of whom have a right to self-determination and to independent statehood.¹⁵⁹

The League of Arab States now appears to share this view. In its written memorial submitted to the International Court of Justice during the proceedings in the *Legal consequences of the construction of a wall* advisory opinion, it argued that Israel’s membership of the United Nations was conditional upon its acceptance of resolution 181, and thus Israel was under an obligation to abide by its terms which included “recognition of the right to statehood of the Arab Palestinians.” Just as resolution 181 was the foundation of Israel’s legitimacy as a State, the Arab League claimed it also provided legitimacy for the Palestinian State declared by the Palestinian National Council in Algiers on 15 November 1988.¹⁶⁰ Indeed, the Algiers Declaration of Independence itself relies on resolution 181, providing:

Despite the historical injustice inflicted on the Palestinian Arab people resulting in their dispersion and depriving them of their right to self-determination, following upon UN General Assembly Resolution 181 (1947), which

¹⁵⁸ General Assembly, 207th Plenary meeting (11 May 1949), GAOR, Third Session, Plenary Meetings Part II, 333. Deputy Foreign Minister Ayalon also relied on self-determination in his 30 June 2009 statement on the recognition of Israel as a Jewish State, see www.mfa.gov.il/MFA/About+the+Ministry/Deputy_Foreign_Minister/Speeches/Dep_FM_Ayalon_recognizing_Israel_Jewish_state_30-Jun-2009.htm?DisplayMode+print: also available at www.youtube.com/watch?v=OwNh3oaXvOE.

¹⁵⁹ SCOR, 383rd meeting (2 December 1948), S P/V.383, 22: see also his statement to the Security Council at its 386th meeting (17 December 1948), S P/V.386, 28 and 32.

¹⁶⁰ Written Statement of the League of Arab States, January 2004, 66-67, paras.8.10-8.12.

partitioned Palestine into two states, one Arab, one Jewish, yet it is this Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty.¹⁶¹

C. CHANGING THE BOUNDARIES CONTAINED IN RESOLUTION 181

Even before Israel was admitted as a member of the United Nations, it claimed that circumstances had rendered the boundaries set out in resolution 181 subject to change. Before the First Committee of the General Assembly on 23 November 1948, Eban, representing the Provisional Government of Israel, rejected a British proposal that the Negev should be detached from Israel. He stated that, by virtue of resolution 181, the General Assembly had sanctioned the inclusion of the Negev within Israel and, because Palestine was no longer mandated territory subject to the General Assembly's authority, territory could no longer be detached from Israel without its consent:

The independent State of Israel had come into existence and no outside body had a right to dispose of its territory or interfere in its domestic affairs. The Charter itself forbade such interference.¹⁶²

On the other hand, Israel now laid claim to Western Galilee because the reasons why this area had been excluded from Israel under the Partition Plan were no longer valid. Its inclusion within Israel would not create an Arab majority within its territory as that population had left, thus removing the reason why it had been assigned to the projected Arab State. As Western Galilee did not form part of any existing State, the General Assembly could dispose of it:

the Arab State for which it was to serve as a land reserve had failed to materialize, and no neighbouring Arab State

¹⁶¹ Palestinian Declaration of Independence, available at <www.al-bab.com/arab/docs/pal/pal3.htm>. This Declaration, and States' recognition of Palestine, will be considered in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

¹⁶² General Assembly, 208th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 712-713.

could validly claim it as a land reserve. Those who urged the annexation of the non-Jewish areas of Palestine by Transjordan could not prove that the latter had a juridical right superior to that of Israel in Western Galilee, nor could they show that Transjordan required further reserve lands in addition to the central region of Palestine which it now held by right of military occupation. Further, events had shown that Western Galilee was vital for Israel's defence.¹⁶³

This is perhaps the first example of Israel arguing that its frontiers should be determined by defense considerations, but it also appears to contain an effacement of the rights of the indigenous Palestinian Arab population. Israel concentrated on its relationship with Jordan, and not the right of the indigenous Arab population of Mandate Palestine to self-determination, or any claims that it might make on the basis of resolution 181. Given Israel's own reliance on resolution 181 as the foundation for its legitimacy and title to its territory, this appears to breach the principle that one cannot take benefits from an instrument while denying the obligations it imposes. This contradicts the analogous ruling made by the International Court in the *International status of South West Africa* advisory opinion that South Africa could not "retain the rights derived from the Mandate and...deny the obligations thereunder."¹⁶⁴ It may be that Israel itself recognised the legal quandary its claim to Western Galilee presented, as Eban contended that:

the Jews did not believe that acceptance of their claim to one stretch of territory could in any way affect the strength of their claim to another. Each case should be decided on its own merits.¹⁶⁵

No elaborated justification was, however, given for this assertion.

Other States took a different view of the matter, arguing that while Israel's territory assigned by resolution 181 could not be reduced without its consent, if it wished to add territory, then it

¹⁶³ General Assembly, 208th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 714-715.

¹⁶⁴ *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 133.

¹⁶⁵ General Assembly, 208th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 715.

would have to offer territory in exchange which would be acceptable to the Arabs.¹⁶⁶ Israel had, however, also anticipated this argument, as Eban rejected any notion that there should be an automatic exchange should it claim additional territory:

That suggestion took no account of the fact that the Assembly's decision in respect of the Arab areas had not been carried out. Would it be suggested that Transjordan should surrender a part of its own territory in return for retaining Central Palestine which it now occupied? Israel would prefer the establishment of an Arab State in Palestine with which it would be prepared to discuss boundary adjustments, but if that area was to be swallowed up by neighbouring Arab States who were adequately provided with territory, Israel could not acknowledge that they held superior claims to its own.¹⁶⁷

Other States appear to have been unpersuaded by this line of argument and when the General Assembly voted in 11 May 1949 to admit Israel as a member of the United Nations, it expressly referred to the statements made by Israel regarding the implementation of resolutions 181 and 194 during the admissions process.¹⁶⁸

The statement by Eban does illustrate an approach by which attention was deflected from the rights of the indigenous Palestinian Arab population, and in particular its right to self-determination in favour of Israel's relationship with neighboring Arab States. This was also a clear feature of the next phase of delimitation between Israel and neighbouring States, namely, the Armistice Agreements.

¹⁶⁶ See Jessup, representative of the United States, General Assembly, 209th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 724; Rusk, representative of the United States, General Assembly, 219th meeting of the First Committee (1 December 1948), GAOR, Third Session, Part I, 836; and Cadogan, representative of the United Kingdom, 384th meeting of the Security Council (15 December 1948), S/PV.384, 15.

¹⁶⁷ General Assembly, 208th meeting of the First Committee (23 November 1948), GAOR, Third Session, Part I, 715.

¹⁶⁸ General Assembly resolution 273 *Admission of Israel to membership in the United Nations*, A/Res/273 (III), 11 May 1949, preamble. The implications of this will be considered in greater depth in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

VIII. THE 1949 ARMISTICE AGREEMENTS

Between the conclusion of the General Armistice Agreements with Egypt, Lebanon, Jordan and Syria in February-July 1949, and the conclusion of the Six-Day War in June 1967, the land area under Israeli jurisdiction was defined by the demarcation lines (the Green Lines) set out in the 1949 General Armistice Agreements.¹⁶⁹ The Armistice Agreements were concluded pursuant to Security Council resolution 62 (16 November 1948), which was adopted under Chapter VII of the Charter as a provisional measure under Article 40.¹⁷⁰ As the International Court noted in the *Legal consequences of the construction of a wall* advisory opinion, “the Security Council decided that ‘an armistice shall be established in all sectors of Palestine’ and called upon the parties directly involved in the conflict to seek agreement to this end. In

¹⁶⁹ 24 February 1949 Egypt-Israel General Armistice Agreement, 42 United Nations Treaty Series 654; 23 March 1949 Lebanon-Israel General Armistice Agreement, *ibid* 655; 3 April 1949 Jordan-Israel General Armistice Agreement, *ibid* 656; and 20 July 1949 Syria-Israel General Armistice Agreement, *ibid* 657, available online at <<http://treaties.un.org/doc/Publication/UNTS/Volume%2042/v42.pdf>>, and at <http://avalon.law.yale.edu/subject_menus/mideast.asp>.

On the Armistice Agreements, see Bar-Yaacov N, *The Israel-Syria Armistice: problems of implementation, 1946-1966* (Magnes Press, Hebrew University: Jerusalem: 1967); Elaraby, above n.114 (*Legal implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*); Morriss DM, *From war to peace: a study of cease-fire agreements and the evolving role of the United Nations*, 36 Virginia Journal of International Law 801 (1995-1996) 833-849; Rosenne, above n.37 (*Israel's Armistice Agreements*); and also Bailey SD, *Cease-fires, truces, and armistices in the practice of the UN Security Council*, 71 American Journal of International Law 461 (1977); and Levie HS, *The nature and scope of the armistice agreement*, 50 American Journal of International Law 880 (1956).

¹⁷⁰ Article 40 of the UN Charter provides: “In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.” For commentary on Article 40, see Simon D, *Article 40*, in Cot and Pellet, above n.72 (*La Charte*), 667-689, and Frowein JA and Krisch N, *Commentary to Article 40*, in Simma, above n.62 (*UN Charter*), 729-735.

conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighboring States through mediation by the United Nations.”¹⁷¹

The parties’ contemporary understanding of the demarcation lines was that they were provisional and constituted temporary *de facto* international frontiers.¹⁷² In a letter dated 26 June 1949 to the Israeli and Syrian foreign ministries, the UN’s Chief Mediator, Ralph Bunche, stated:

Questions of permanent boundaries, territorial sovereignty, customs, trade relations and the like must be dealt with in the ultimate peace settlement and *not* in the armistice agreement...

I call attention to the fact that in the Israeli-Transjordan Armistice Agreement, in Article V, paragraph c, and in Article VI, paragraph 2, the armistice demarcation lines agreed upon involved changes in the then existing truce lines, and that this was done in both cases without any question being raised as to the sovereignty over or the final disposition of the territory involved. It was taken for granted by all concerned that this was a matter for final peace settlement.¹⁷³

The Israel-Syria armistice conference recorded this explanatory note in its minutes as an authoritative commentary on the proposed Article on the armistice demarcation lines. Rosenne, then Legal Adviser to the Israeli government, stated that he wanted this passage in particular to be included in the conference record

¹⁷¹ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 166, para.72. Rosenne (above n.29 (*Israel’s Armistice Agreements*), 28) points out that although neither Israel nor Jordan were UN members at the time the Armistice Agreements were concluded, they were applicants for membership and had accepted, for the purposes of the dispute, the obligations the UN Charter stipulated for the pacific settlement of disputes as envisaged in Article 35.2 of the UN Charter. For commentary on Article 35, see Daoudi R, *Article 35*, in Cot and Pellet, above n.72 (*La Charte*), 587-601, and Schweisfurth T, *Commentary to Article 35*, in Simma, above n.62 (*UN Charter*), 608-615.

¹⁷² See Sabel, above n.27 (*Green line*), 323-324. The provisions denying the armistice demarcation lines definitive effect were inserted at the insistence of the Arab States, see XX FRUS 1964-68, Doc.356, *Telegram from the Department of State to the US Interests Section of the Spanish Embassy in the United Arab Republic*, 21 December 1968, 706 at 707.

¹⁷³ Quoted in Bar-Yaacov, above n.169 (*Israel-Syria Armistice*) 57-58, emphasis in original: see also 106-107.

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because it interpreted a precedent as it established that arrangements which had been made in the Armistice Agreements were not to affect sovereignty or the final disposition of territory.¹⁷⁴

Further, the Armistice Agreements, except for the one with Lebanon which followed the Mandate boundary between Lebanon and Israel,¹⁷⁵ expressly stated that they did not create permanent or *de iure* borders. Article V.2 of the Egyptian-Israeli Agreement stated that "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question." Article II.2 of the Jordanian-Israeli Agreement provided that "no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either Party hereto in the peaceful settlement of the Palestine questions, the provisions of this Agreement being dictated exclusively by military considerations," while Article VI.9 stated "The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto." Finally, Article V.1 of the Syria-Israel Agreement provided, "It is emphasized that the following arrangements for the Armistice Demarcation Line between the Israeli and Syrian armed forces and for the Demilitarized Zone are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties to this Agreement."

Thus, at the Security Council's 433rd meeting (4 August 1949), the Israeli foreign minister, Abba Eban, stated that the armistices were "a provisional settlement which can only be replaced by a peace agreement" and that the demarcation lines "have the normal characteristics of provisional frontiers until such time as a new process of negotiation and agreement determines the final territorial settlement." He continued:

The Armistice Agreements are not peace treaties. They do not prejudice the final territorial settlements. On the other hand, the provisional settlement established by the

¹⁷⁴ Bar-Yaacov, above n.169 (*Israel-Syria Armistice*) 59.

¹⁷⁵ See Bar-Yaacov, above n.169 (*Israel-Syria Armistice*) 35.

Armistice Agreements is unchallengeable until a new process of negotiation and agreement has been successfully consummated.¹⁷⁶

Accordingly, Crawford overstates the case when he claims that Israel's "original territory was its armistice territory, not the partition territory."¹⁷⁷

Two years later, however, Rosenne appeared to depart from this consensus in his monograph on the Armistice Agreements. He cautioned placing too much reliance on the fact that these agreements were ordered as provisional measures by the Security Council in determining the weight to be given to the territorial settlements they embodied, arguing that the term "provisional measures" referred to the negotiations which preceded the conclusion of the agreements.¹⁷⁸ Further:

The fact that the Armistice Agreements specifically state that they do not prejudice in any way the rights, claims and position of either Party in the ultimate settlement of the Palestine question is certainly not sufficient in itself to confer a provisional character upon the territorial arrangements which they brought about. Probably the only way to ensure this consequence would be if any party claiming a revision of the armistice demarcation line could establish that it had rights to a different line...Things might have been different had the Security Council, in the purported exercise of its general powers to restore peace, recommended or ordered such territorial adjustments as it found necessary for the restoration of peace.¹⁷⁹

He also argued that the Armistice Agreements differed from other armistice agreements because they resulted from negotiations undertaken pursuant to an invitation backed by a threat from an outside body, the Security Council, and under the continuous supervision and active intervention of the Secretariat. Accordingly, the provisions of Articles 36 and 37 of the Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of

¹⁷⁶ Quoted in Rosenne, above n.37 (*Israel's Armistice Agreements*) 75-76.

¹⁷⁷ Crawford, above n.16 (*Creation of States*), 434.

¹⁷⁸ Rosenne, above n.37 (*Israel's Armistice Agreements*) 33-39.

¹⁷⁹ Rosenne, above n.37 (*Israel's Armistice Agreements*), 49.

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War on Land¹⁸⁰ were of little guidance in determining their import:

The Hague Convention...had proceeded on two assumptions. The first was that the armistice is nominally of limited duration. The second was that the contents of an armistice agreement are a matter for the belligerents alone, in which the outside world is not interested. It is precisely those two assumptions which were absent from our negotiations...For our Armistice Agreements were always subordinate to the obligation, contained in the Charter, to refrain from the threat or use of force and to settle international disputes by peaceful means.¹⁸¹

As a result, Rosenne concluded that it was possible that “the juridical function of these lines is far greater, and that they are indistinguishable from international frontiers proper.”¹⁸² It could be argued that Israel has no legitimate title to the territory lying beyond the partition lines set out in resolution 181 to the Armistice demarcation lines, as this was territory acquired through the use of force. Rosenne’s view has however consolidated, particularly as a result of the recognition by the PLO of Israel’s right to exist within its pre-1967 borders and the principle of the relativity of territorial claims.¹⁸³ It may therefore be argued that the armistice lines delineating the West Bank and Gaza are, presumptively, the international boundaries between Israel and any future Palestinian State.

The PLO first, albeit implicitly, recognised the permanency of Israel’s pre-1967 boundaries (and thus the armistice lines) in the communiqué issued by the Palestine National Council in Algiers on November 15, 1988. This was an explanatory note which accompanied the Declaration of Independence of the State of Palestine. It provided, in part:

¹⁸⁰ Hague Regulation 36 provides: “An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice”. Regulation 37 provides: “An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.”

¹⁸¹ Rosenne, above n.37 (*Israel’s Armistice Agreements*), 28.

¹⁸² Rosenne, above n.37 (*Israel’s Armistice Agreements*), 47.

¹⁸³ This issue will be considered in greater depth in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

the Palestine National Council, being responsible to the Palestinian people, their national rights and their desire for peace as expressed in the Declaration of Independence issued on 15 November 1988...affirms the determination of the Palestine Liberation Organisation to arrive at a comprehensive settlement of the Arab-Israeli conflict and its core, which is the question of Palestine, within the framework of the United Nations Charter, the principles and provisions of international legality, the norms of international law, and the resolutions of the United Nations...in such a manner that safeguards the Palestinian Arab people's rights to return, to self-determination, and the establishment of their independent national state on their national soil, and that institutes arrangements for the security and peace of all states in the region.

Toward the achievement of this, the Palestine National Council affirms:

1. The necessity of convening the effective international conference on the issue of the Middle East and its core, the question of Palestine, under the auspices of the United Nations and with the participation of the permanent members of the Security Council and all parties to the conflict in the region including the Palestine Liberation Organisation, the sole, legitimate representative of the Palestinian people, on an equal footing, and by considering that the international peace conference be convened on the basis of United Nations Security Council resolutions 242 and 338 and the attainment of the legitimate national rights of the Palestinian people, foremost among which is the right to self-determination and in accordance with the principles and provisions of the United Nations Charter concerning the right of peoples to self-determination, and by the inadmissibility of the acquisition of the territory of others by force or military conquest, and in accordance with the relevant United Nations resolutions on the question of Palestine.

2. The withdrawal of Israel from all the Palestinian and Arab territories it occupied in 1967, including Arab Jerusalem.

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3. The annulment of all measures of annexation and appropriation and the removal of settlements established by Israel in the Palestinian and Arab territories since 1967.¹⁸⁴

The formal recognition of Israel's right to exist "in peace and security" was contained in Chairman Arafat's 9 September 1993 letter to Prime Minister Rabin: this also contained an express acceptance of Security Council resolutions 242 and 338.¹⁸⁵

¹⁸⁴ Available at <www.al-bab.com/arab/docs/pal/pal4.htm>.

¹⁸⁵ Chairman Arafat's letter, and Prime Minister Rabin's reply, which expressly recognised the PLO as the legitimate representative of the Palestinian people, are reproduced at 7 *Palestine Yearbook of International Law* (1992-1994) 230-231.

IX. CONSEQUENCES OF THE SIX-DAY WAR

During the Six-Day War in June 1967, Israel gained control over and occupied East Jerusalem, Gaza, the Golan Heights, Sinai and the West Bank. On 19 June 1967, President Johnson delivered an address to the National Foreign Policy Conference of Educators in Washington in which he set out five principles which became the baseline for United States' policy towards the situation in the Middle East. His fifth principle structured its policy on territorial issues, and provided:

the crisis underlines the importance of respect for political independence and territorial integrity of all the states of the area. We reaffirmed that principle at the height of this crisis. We reaffirm it again today on behalf of all. This principle can be effective in the Middle East only on the basis of peace between the parties. The nations of the region have had only fragile and violated truce lines for 20 years. What they now need are recognized boundaries and other arrangements that will give them security against terror, destruction, and war. Further, there just must be adequate recognition of the special interest of three great religions in the holy places of Jerusalem.

...

There are some who have urged, as a single, simple solution, an immediate return to the situation as it was on June 4. As our distinguished and able Ambassador, Mr Arthur Goldberg, has already said, this is not a prescription for peace but for renewed hostilities. Certainly, troops must be withdrawn; but there must also be recognized rights of national life, progress in solving the refugee problem, freedom of innocent maritime passage, limitation of the arms race, and respect for political independence and territorial integrity.¹⁸⁶

¹⁸⁶ Reproduced on Israel's Ministry of Foreign Affairs website, <www.mfa.gov.il/MFA/> under the Foreign Relations/Historical Documents

Consequences of the Six-Day War

The United States' policy was, in sum, one of withdrawal to slightly modified frontiers aimed at ensuring Israel's security, but did not support its territorial expansion.¹⁸⁷

Shortly after the end of hostilities, on 27 June 1967, the Knesset promulgated the *Law and Administration Ordinance (Amendment No.11)* Law which provided that "the law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order."¹⁸⁸ The next day, the Israeli Government proclaimed new boundaries for the city of Jerusalem which incorporated those parts of East Jerusalem which previously had been under Jordanian administration.¹⁸⁹

hyperlink.

¹⁸⁷ See XIX FRUS 1964-68, Doc.454, *Telegram from the Mission to the United Nations to the Department of State, 3 October 1967*, 862 at 865; Doc.481, *Telegram from the Mission to the United Nations to the Department of State, 24 October 1967*, 921 at 927; Doc.488, *Memorandum of conversation, 24 October 1967*, 944 at 947; and Doc.501, *Telegram from the Mission to the United Nations to the Department of State, 4 November 1967*, 981 at 982-983; and XX FRUS 1964-68, Doc.213, *Telegram from the Embassy in Israel to the Department of State, 17 July 1948*, 410 at 412; Doc.256, *Memorandum of conversation, 19 September 1968*, 504 at 506; Doc.301, *Telegram from the Mission to the United Nations to the Department of State, 3 November 1968*, 589 at 591 and 595; Doc.320, *Telegram from the Department of State to the Embassy in Israel, 13 November 1968*, 633 at 633-636; Doc.321, *Memorandum of conversation, 14 November 1968*, 638 at 639; Doc.328, *Telegram from the Embassy in Jordan to the Department of State, 20 November 1968*, 653; Doc.356, *Telegram from the Department of State to the US Interests Section of the Spanish Embassy in the United Arab Republic, 21 December 1968*, 706 at 707-708; and Doc.362, *Telegram from the Department of State to the Embassy in Israel, 25 December 1968*, 719 at 720-721.

¹⁸⁸ Reproduced 21 Laws of the State of Israel 75, and also Medzini M (Ed), *Israel's foreign relations: selected documents, 1947-1974* (Ministry for Foreign Affairs: Jerusalem: 1976), Vol.I, 245.

¹⁸⁹ There is an extensive literature on the status of Jerusalem and its role in the peace process: see, for example, Aziz DFA, *The utility if an international legal approach to the Jerusalem question: camera obscura or camera lucida?*, 7 Singapore Journal of International and Comparative Law 511 (2003); Berman N, *Legalizing Jerusalem or, of law, fantasy, and faith*, 45 Catholic University Law Review 823 (1995-1996); Blum, above n.12 (*Jerusalem*); Cattan H, *Jerusalem* (St Martin's Press: New York: 1981); Eisner M, *Jerusalem: an analysis of legal claims and political realities*, 12 Wisconsin International Law Journal 221 (1993-1994); Gruhin MI, *Jerusalem: legal and political dimensions in a search for peace*, 12 Case Western Reserve Journal of International Law 169 (1980); Hirsch M, *The legal status of Jerusalem following the ICJ advisory opinion on the separation barrier*, 38 Israel Law Review 298 (2005); Kletter L, *The sovereignty of Jerusalem in international law*, 20 Columbia Journal of Transnational Law 319 (1982); Kraemer JL (Ed), *Jerusalem: problems and prospects* (Praeger: New York: 1980); Lapidoth R, *Jerusalem and the peace process*, 28 Israel Law Review 402 (1994), and her *Jerusalem—some*

Subsequently, in July 1980, the Knesset adopted the *Basic Law: Jerusalem Capital of Israel* which states that "Jerusalem united in its entirety is the capital of Israel."¹⁹⁰ Although the Israeli Government claimed in 1967 that it had not annexed East Jerusalem,¹⁹¹ the continued accuracy of this claim is open to doubt. Indeed, Israel High Court judges have ruled that East Jerusalem has been annexed and made part of Israeli territory.¹⁹²

Security Council resolution 242 (22 November 1967), which was adopted in an attempt to provide a framework for peace negotiations after the Six-Day War, contained a directive on territorial settlement, but consciously made no reference to Jerusalem.¹⁹³ Security Council resolution 242 provides:

jurisprudential aspects, 45 Catholic University Law Review 661 (1995-1996); Lewis SL, *Reflections on the future of Jerusalem*, 45 Catholic University Law Review 695 (1995-1996); Lustick IS, *Has Israel annexed East Jerusalem*, 5/1 Middle East Policy Council Journal (January, 1997) <www.mepec.org/journal_vol5/9701_lustick.asp>; Perez AF, *Sovereignty, freedom and civil society: toward a new Jerusalem*, 45 Catholic University Law Review 851 (1995-1996); Quigley J, *Sovereignty in Jerusalem*, 45 Catholic University Law Review 765 (1995-1996), and his *Jerusalem: the illegality of Israel's encroachment*, 9 Palestine Yearbook of International Law 19 (1996-1997); Slonim S, *The United States and the status of Jerusalem 1947-1984*, 19 Israel Law Review 179 (1984); and Whitbeck JV, *The road to peace starts in Jerusalem: the "condominium" solution*, 45 Catholic University Law Review 781 (1995-1996).

¹⁹⁰ 34 Laws of the State of Israel 209.

¹⁹¹ See *Letter from Foreign Minister Eban to Secretary-General U Thant on Jerusalem, 10 July 1967*, in Medzini, above n.188 (*Israel's foreign relations*), 248—at 249, "The term 'annexation' used by supporters of the resolution is out of place. The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places in Jerusalem."

¹⁹² See *Muhammad Abdullah Iwad and Zeev Shimshon Maches v Military Court, Hebron District, and Military Prosecutor for the West Bank Region, IDF*, Israel Supreme Court, 48 International Law Reports 63, opinion of Kahn J, 67 (but compare Witkon J at 65 and Cohn J at 66); *Avalon Hanzalis v Greek Orthodox Patriarchate Religious Court and Constandinos Nicola Papadopoulos*, Israel Supreme Court, 48 International Law Reports 93, opinion of Halevi J, 98, para.2, and 5 Israel Law Review 120 (1970) 122, and Guberman S, *Comment*, *ibid*, 129 at 131-132. See also *Shabtai Ben-Dov v Minister of Religious Affairs*, Israel Supreme Court, 47 International Law Reports 472 where President Agranat (at 473) described the 1967 legislation as "a clear act of sovereignty": this implies annexation as an occupant does not possess sovereignty over occupied territory.

¹⁹³ In a letter published in the *New York Times* on 12 March 1980, Goldberg, the United States Ambassador to the United Nations at the time the Security Council adopted resolution 242 stated, "Resolution 242 in no way refers to Jerusalem, and this omission was deliberate. I wanted to make clear that Jerusalem was a discrete matter, not linked to the West Bank": quoted in Slonim, above n.189 (*United States and Jerusalem 1947-1984*), 217.

Consequences of the Six-Day War

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
 - (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
 - (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;
2. Affirms further the necessity
 - (a) For guaranteeing freedom of navigation through international waterways in the area;
 - (b) For achieving a just settlement of the refugee problem;
 - (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through

measures including the establishment of demilitarized zones;

3. Requests the Secretary General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;
4. Requests the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Resolution 242 was adopted under Chapter VI of the UN Charter,¹⁹⁴ and accordingly has the force of a recommendation rather than a binding decision.¹⁹⁵ As Israel, Jordan, Syria and the United Arab Republic were not members of the Security Council, their representatives were invited to join in the discussions leading to the adoption of resolution 242 as non-voting participants within the terms of Article 32 of the UN Charter.¹⁹⁶

The diplomatic negotiations behind resolution 242 demonstrate that the principal policy points it was intended to encompass were, broadly, that Israel should withdraw from the territories it had occupied as a result of the Six-Day War, but that this should be coupled with an end to the state of belligerency between the actors in the Middle East. This linkage was discussed in the debates in the Security Council, and was emphasised in the diplomatic exchanges which preceded the adoption of resolution

¹⁹⁴ See the statement made by de Carvalho Silos, representative of Brazil, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, para.124.

¹⁹⁵ See Shapira A, *The Security Council resolution of November 22, 1967—its legal nature and implications*, 4 Israel Law Review 229 (1969).

¹⁹⁶ Article 32 of the UN Charter provides, "Any Member of the United Nations which is not a member of the Security Council or any State which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a State which is not a Member of the United Nations". For commentary, see Leprette J, *Article 32*, in Cot and Pellet, above n.72 (*La Charte*), 557-563, and Dolzer R, *Commentary to Article 32*, in Simma, above n.62 (*UN Charter*), 729-735.

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242. While the United States in particular stressed the importance of both policies, Israel objected that while withdrawal required it to undertake precise action, the corresponding requirement of non-belligerency was rather imprecise and left open the action to be taken by the Arab States.¹⁹⁷

Between the end of the Six-Day War, however, and the adoption of resolution 242 on 22 November 1967, Israel's attitude to its withdrawal from the territories it had occupied changed substantially. On 8 June 1967, Israel's Foreign Minister, Eban, told the United States' Ambassador to the UN, Goldberg, that Israel was not seeking territorial aggrandisement as a result of the then current Six-Day War and that it had no "colonial" aspirations, but he made no specific commitments and gave few specific details. Eban did, however, state that Israel had no designs on the territory of the United Arab Republic but merely sought security arrangements to protect Israel. In reply, Goldberg underlined that it was necessary for both US and world public opinion that Israel should not emerge from the war as a power which had designs to infringe upon the territorial integrity of other States.¹⁹⁸ In a speech on 13 June 1967 to Israeli military units, Prime Minister Eshkol similarly denied that Israel harboured any intention of acquiring territory as a result of the war,¹⁹⁹ but Israel's stance changed by early October. By then, it had rejected any suggestion that it should withdraw to its 4 June 1967 borders—the armistice lines—but instead sought territorial changes which would provide it with "secure" frontiers.²⁰⁰ While it was not clear where these lines should be drawn, Israel was adamant that it would not tolerate a divided jurisdiction in Jerusalem, and also hoped to eliminate

¹⁹⁷ See XIX FRUS 1964-68, Doc.458, *Telegram from the Department of State to the Embassy in Israel, 7 December 1967*, 874 at 875; and also, Doc.484, *Letter from President Johnson to Premier Kosygin, 23 October 1967*, 935 at 938; Doc.485, *Telegram from the Mission to the United Nations to the Department of State, 24 October 1967*, 938 at 940; Doc.499, *Memorandum of conversation, 3 November 1967*, 969 at 971; and Doc.510, *Memorandum from Presidential Special Assistant (Rostow) to President Johnson, 6 November 1967*, 1006.

¹⁹⁸ XIX FRUS 1964-68, Doc.227, *Telegram from the Mission to the United Nations to the Department of State*, 386-387; see also Doc.530, *Information memorandum from the Assistant Secretary of State for Near Eastern and South Asian Affairs (Battle) to Secretary of State Rusk, 17 November 1967*, 1043 at 1044.

¹⁹⁹ XIX FRUS 1964-68, Doc.530, *Information memorandum from the Assistant Secretary of State for Near Eastern and South Asian Affairs (Battle) to Secretary of State Rusk, 17 November 1967*, 1043 at 1045.

²⁰⁰ XIX FRUS 1964-68, Doc.455, *Memorandum from the President's Special Assistant (Rostow) to President Johnson, 3 October 1967*, 866 at 868.

Egyptian influence in Gaza.²⁰¹ Thus Israel placed itself in opposition to the views of other States, not parties to the conflict, such as the United Kingdom,²⁰² the Soviet Union,²⁰³ India,²⁰⁴ and Latin American States,²⁰⁵ which demanded a complete withdrawal to the armistice lines. By virtue of a cabinet resolution of 8 November 1967, the Israeli position hardened. This rejected any settlement which was not reached through direct negotiations and formalized in peace treaties: it was described as “a prescription for ‘instant peace’ entirely on Israel’s terms.” Israel would not withdraw to the armistice lines “at any time or in any circumstances.” It was clear that Israel envisaged that its boundaries should include the entire city of Jerusalem, part of the Golan Heights and Gaza, while border adjustments should be made in the West Bank on the basis of security, thus demonstrating “growing Israeli territorial appetites” and “the prospect of permanent Israeli occupation of the Arab territories now held.”²⁰⁶

²⁰¹ XIX FRUS 1964-68, Doc.482, *Memorandum of conversation, 23 October 1967*, 928 at 929. On Israel’s position before resolution 242 was adopted, see also Doc.487, *Memorandum from the President’s Special Assistant (Rostow) to President Johnson, 24 October 1967*, 941; Doc. 488, *Memorandum of conversation, 24 October 1967*, 944; Doc.489, *Telegram from the Mission to the United Nations to the Department of State, 26 October 1967*, 948 at 949; Doc.498, *Memorandum of conversation, 2 November 1967*, 967; Doc.528, *Telegram from the Mission to the United Nations to the Department of State, 18 November 1967*, 1039 at 1040; and Doc.530, *Information memorandum from the Assistant Secretary of State for Near Eastern and South Asian Affairs (Battle) to Secretary of State Rusk, 17 November 1967*, 1043.

²⁰² See XIX FRUS 1964-68, Doc.460, *Telegram from the Mission to the United Nations to the Department of State, 10 October 1967*, 878; Doc.503, *Telegram from the Mission to the United Nations to the Department of State, 4 November 1967*, 991; and Doc.517, *Telegram from the Mission to the United Nations to the Department of State, 11 November 1967*, 1018 at 1019.

²⁰³ See XIX FRUS 1964-68, Doc.467, *Memorandum from the President’s Special Assistant (Rostow) to President Johnson, 12 October 1967*, 891 at 892; Doc.480, *Letter from Premier Kosygin to President Johnson, 20 October 1967*, 918; Doc.481, *Telegram from the Mission to the United Nations to the Department of State, 24 October 1967*, 921-924; Doc.534, *Letter from Premier Kosygin to President Johnson, undated (transmitted 20 November 1967)*, 1050; and Doc.537, *Telegram from the Mission to the United Nations to the Department of State, 21 November 1967*, 1055.

²⁰⁴ XIX FRUS 1964-68, Doc.510, *Memorandum from the President’s Special Assistant (Rostow) to President Johnson, 6 November 1967*, 1006; and Doc.541, *Editorial Note*, 1061.

²⁰⁵ XIX FRUS 1964-68, Doc.524, *Memorandum from Nathaniel Davis of the National Security Council Staff to the President’s Special Assistant (Rostow)*, 13 November 1967, 1032.

²⁰⁶ XIX FRUS 1964-68, Doc.530, *Information memorandum from the Assistant Secretary of State for Near Eastern and South Asian Affairs (Battle) to Secretary of*

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On the basis of the Johnson principles of 19 June 1967,²⁰⁷ the United States' policy was that Israel should withdraw from the territory it had occupied to slightly modified frontiers which would ensure its security, but rejected claims which would expand Israel's territory.²⁰⁸ The United States thought that this was justified on the basis of the 1949 Armistice Agreements, but also maintained that there should be compensatory exchanges of territory.²⁰⁹ Further, the United States refused to accept unilateral territorial changes imposed by Israel, and rejected its claim that the status of Jerusalem was not negotiable.²¹⁰ While it became clear that the Israeli Cabinet's resolution of 8 November 1967 put the United States and Israel "on divergent courses,"²¹¹ differences

State Rusk, 17 November 1967, 1043-1045. See also Lynk M, *Conceived in law: the legal foundations of resolution 242*, 37 *Journal of Palestine Studies* 7 (2007) 9— "When Rusk reminded Eban later in the summer about Israel's earlier pledge, Eban shrugged his shoulders and said, 'We've changed our minds.'"

²⁰⁷ Reproduced on Israel's Ministry of Foreign Affairs website, <www.mfa.gov.il/MFA/> under the Foreign Relations/Historical Documents.

²⁰⁸ See XIX FRUS 1964-68, Doc.454, *Telegram from the Mission to the United Nations to the Department of State*, 3 October 1967, 862 at 865; Doc.481, *Telegram from the Mission to the United Nations to the Department of State*, 24 October 1967, 921 at 927; Doc.488, *Memorandum of conversation*, 24 October 1967, 944 at 947; and Doc.501, *Telegram from the Mission to the United Nations to the Department of State*, 4 November 1967, 981 at 982-983; and XX FRUS 1964-68, Doc.213, *Telegram from the Embassy in Israel to the Department of State*, 17 July 1948, 410 at 412; Doc.256, *Memorandum of conversation*, 19 September 1968, 504 at 506; Doc.301, *Telegram from the Mission to the United Nations to the Department of State*, 3 November 1968, 589 at 591 and 595; Doc.320, *Telegram from the Department of State to the Embassy in Israel*, 13 November 1968, 633 at 633-636; Doc.321, *Memorandum of conversation*, 14 November 1968, 638 at 639; Doc.328, *Telegram from the Embassy in Jordan to the Department of State*, 20 November 1968, 653; Doc.356, *Telegram from the Department of State to the US Interests Section of the Spanish Embassy in the United Arab Republic*, 21 December 1968, 706 at 707-708; and Doc.362, *Telegram from the Department of State to the Embassy in Israel*, 25 December 1968, 719 at 720-721.

²⁰⁹ XIX FRUS 1964-68, Doc.501, *Telegram from the Mission to the United Nations to the Department of State*, 4 November 1967, 981 at 983; and Doc.505, *Telegram from the Department of State to the Embassy in Israel*, 5 November 1967, 994 at 995; and XX FRUS 1964-68, Doc.320, *Telegram from the Department of State to the Embassy in Israel*, 13 November 1968, 633; and Doc.328, *Telegram from the Embassy in Jordan to the Department of State*, 20 November 1968, 653 at 654.

²¹⁰ XIX FRUS 1964-68, Doc.455, *Memorandum from the President's Special Assistant (Rostow) to President Johnson*, 3 October 1967, 866 at 869; and Doc.501, *Telegram from the Mission to the United Nations to the Department of State*, 4 November 1967, 981 at 983.

²¹¹ See XIX FRUS 1964-68, Doc.530, *Information memorandum from the Assistant Secretary of State for Near Eastern and South Asian Affairs (Battle) to Secretary of State Rusk*, 17 November 1967, 1043 at 1045.

had arisen earlier. In a meeting on 23 October 1967, when Rostow, President Johnson's Special Assistant, had observed to Israel's foreign minister Eban that the United States thought that there was a great difference between "minor and major" modifications in the armistice lines, Eban had replied that what the United States "may consider minor may seem major to us."²¹² Subsequently, Rostow expressed the opinion that Israel had gone its own way with little consultation with the United States, and that he had gained the impression that Israel felt free to keep all the territory it had occupied.²¹³

This divergence became a recurring theme in diplomatic exchanges between the United States and Israel following the adoption of resolution 242. During a meeting held on 12 November 1968, Rabin (then Israeli ambassador to the United States) stated that Israel thought that secure and recognised boundaries would require some territorial changes, and that it had been made clear to the United States that Israel did not interpret the withdrawal clause in resolution 242 to require that Israel withdraw from all the territory it had occupied as a result of the Six-Day War. Rather, "Israel's guideline was security; it was not seeking real estate for its own sake." In reply, Under Secretary of State Katzenbach summarised the United States' position on territorial settlement:

To us the words "recognized and secure" meant "security arrangements" and "recognition" of new lines as international boundaries. We had never meant that Israel could extend its territory to [the] West Bank or Suez if this was what it felt its security required. We had always thought [the] new map would look very much like [the] pre-war map but with Israel's security assured...If more than that was involved then [the] US and Israel would be on divergent courses.²¹⁴

A subsequent meeting was held to elucidate Israel's reaction to Katzenbach's discussion with Rabin. Argov, then minister at the Israeli Embassy in Washington, claimed that the United States had

²¹² XIX FRUS 1964-68, Doc.482, *Memorandum of conversation, 23 October 1967*, 928 at 929.

²¹³ XIX FRUS 1964-68, Doc.487, *Memorandum from the President's Special Assistant (Rostow) to President Johnson, 24 October 1967*, 941 at 942.

²¹⁴ XX FRUS 1964-68, Doc.320, *Telegram from the Department of State to the Embassy in Israel, 13 November 1968*, 633 at 635-636.

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changed its position on territorial questions. In response Saunders, a staff member of the National Security Council, stated:

Our policy has not changed. We've talked consistently about territorial integrity.; about withdrawal.; about Jordan getting the West Bank back.; about the inadmissibility of the conquest of territory by force.; about boundary changes only as they're agreed in "honest negotiation" as parts of a "just compromise" not dominated by "the weight of conquest"...I said we had heard Israelis describe the Dayan plan, the Allon plan, the corridor-to-Sharm-el-Sheikh plan and the keep-all-of-Jerusalem plan. Each time we have heard one of these, we have said repeatedly and at all levels that none of these is good enough to produce peace. As a matter of principle, our position has been clear.

In his record of this conversation, Saunders commented, "We never agreed to their border schemes, but they never took us seriously; they just turned off their hearing aids."²¹⁵ He concluded that although the United States had taken Israel into its confidence, "frankly, we don't feel Israel has listened very attentively or taken our views seriously."²¹⁶

A. THE INTERPRETATION OF RESOLUTION 242

There are two disputed elements in the interpretation of resolution 242.²¹⁷ One concerns the nature of the "package deal"²¹⁸ it contains which balances the two elements of its first operative paragraph, namely, the withdrawal of Israeli armed forces from

²¹⁵ XX FRUS 1964-68, Doc.321, *Memorandum of conversation, 14 November 1968*, 638 at 639.

²¹⁶ XX FRUS 1964-68, Doc.321, *Memorandum of conversation, 14 November 1968*, 638 at 640.

²¹⁷ On linguistic considerations in the interpretation of Security Council resolutions, and resolution 242 in particular, see Rosenne S, *On multi-lingual interpretation*, 6 Israel Law Review 360 (1971); on interpretation more generally, see Wood MC, *The interpretation of Security Council resolutions*, 2 Max Planck Yearbook of United Nations Law 73 (1998).

²¹⁸ The term was apparently employed by the USSR to describe the nature of resolution 242: see Rostow E, *The illegality of the Arab attack on Israel of October 6, 1973*, 69 American Journal of International Law 272 (1975) 278.

“territories occupied” during the Six Day War, and the termination of all states of belligerency between the disputant States with the acknowledgement of the sovereignty of every State in the area and their right to live in peace within secure and recognized boundaries. The second concerns the “territories” from which Israel should withdraw.

The existence, and nature, of this package deal was discussed in the Security Council in its meetings which culminated in the adoption of resolution 242. Thus, for example, in discussing a draft resolution proposed by the United States (which was subsequently withdrawn), its representative emphasised that the requirement to withdraw referred to Israel, while that of terminating states of belligerence referred primarily to the Arab States. Nevertheless, the two issues were interdependent.²¹⁹ In introducing the text of the draft resolution which was adopted as resolution 242, the United Kingdom elaborated the nature of the balance of interests it contained:

11. In the long discussions with representatives of Arab countries, they have made it clear that they seek no more than justice. The central issue of the recovery and restoration of their territories is naturally uppermost in their minds. The issue of withdrawal to them is all-important and, of course, they seek a just settlement to end the long suffering of the refugees.

12. The Israelis, on the other hand, tell us that withdrawal must never be to insecurity and hostility. The action to be taken must be within the framework of a permanent peace and withdrawal must be to secure boundaries. There must be an end of the use aid [*sic*, and?] threat and fear of violence and hostility. I have said before that these aims do not conflict; they are equal. They are both essential, There must be adequate provision in any resolution to meet them both, since to attempt to pursue one without the other would be foolish and futile.²²⁰

He added that, in the first operative paragraph, with due respect

²¹⁹ Goldberg, representative of the United States, SCOR, 1377th meeting (15 November 1967), S/PV.1377, paras.63-65.

²²⁰ Caradon, representative of the United Kingdom, SCOR, 1379th meeting (16 November 1967), S/PV.1379, paras.11-12.

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for fulfilment of Charter principles, it was essential that the principles of both withdrawal and security be applied—"we have no doubt that the words set out throughout that paragraph are perfectly clear."²²¹ Other members of the Security Council emphasised the inclusion of this mutuality of interests in the text of the resolution.²²² As the representative of India commented:

While the first principle of our draft requires the withdrawal of Israel armed forces from all occupied territories, the second requires the termination of belligerency by all States in the area. The equality of obligation of all States is thus maintained in a fair and balanced manner and takes account of the views of the great majority of the Members of the United Nations as well as of the views of the parties concerned.²²³

The question thus became one of the mechanism by which these mutual requirements should be undertaken. The peace settlement envisaged in resolution 242 did not come to pass, and the Israeli position became that it was not required to withdraw until this had been concluded.²²⁴ Given Israel's conclusion of peace agreements with Egypt²²⁵ and Jordan²²⁶, which are without

²²¹ Caradon, representative of the United Kingdom, SCOR, 1379th meeting (16 November 1967), S/PV.1379, para.16.

²²² See Parthasarathi, representative of India, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, paras.45 and 47; Berard, representative of France, *ibid*, paras.111-113; and Ruda, representative of Argentina, *ibid*, paras.162-165.

²²³ Parthasarathi, representative of India, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, para.47.

²²⁴ See Eban, representative of Israel, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, paras.88-94; and also Goldberg AJ, *United Nations Security Council resolution 242 and the prospects for peace in the Middle East*, 12 Columbia Journal of Transnational Law 187 (1973) 190; Rostow, above n.218 (*Illegality of the Arab attack*), 276-277, 280 and 282, and above n.135 (*Palestinian self-determination*), 165.

²²⁵ Egypt-Israel Treaty of Peace, 26 March 1979, 1136 United Nations Treaty Series 17813 (registered by Egypt) and 1138 United Nations Treaty Series 17855 (treaty and annexes, registered by Israel) and *ibid* 17856 (agreed minutes, registered by Israel); and also reproduced 18 International Legal Materials 362 (1979). Article II provides, "The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine...without prejudice to the issue of the status of the Gaza Strip. The Parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace".

²²⁶ Jordan-Israel Treaty of Peace, 26 October 1994, 2042 United Nations Treaty Series 35325; reproduced 34 International Legal Materials 43 (1995). The third

prejudice to the status of East Jerusalem, Gaza or the West Bank, it would appear that this argument should now be redundant in relation to those territories.

Nevertheless, and leaving the issue of the Golan Heights to one side, there is a subsisting dispute regarding the identification of the territories from which Israel should withdraw under the terms of resolution 242. For example, Dore Gold, a former Israeli ambassador to the United Nations, has claimed:

Under UN Security Council Resolution 242 from November 22, 1967—that has served as the basis of the 1991 Madrid conference and the 1993 Declaration of Principles—Israel is only expected to withdraw “from territories” to “secure and recognised boundaries” and not from “the territories” or “all the territories” captured in the Six-Day War. This deliberate language resulted from months of painstaking diplomacy.²²⁷

This conflates two inter-related points: the question of “secure and recognised boundaries” and the question of the extent of the required Israeli withdrawal.

During the discussion of the United States draft resolution in the Security Council meetings which led to the adoption of resolution 242, the Israeli representative, participating without vote, stated:

preambular paragraph notes that the treaty aims at “the achievement of a just, lasting and comprehensive peace in the Middle east based on Security Council resolutions 242 and 338 in all their aspects”; and Article 3 provides in part, “1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex 1(a), on the mapping materials attached thereto and coordinates specified therein. 2. The boundary, as set out in Annex 1(a), is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967. 3. The Parties recognize the international boundary, as well as each other’s territory, territorial waters and airspace, as inviolable, and will respect and comply with them.”

²²⁷ Gold D, *From “occupied territories” to “disputed territories”*, Jerusalem Viewpoints, No.470, 2002: as quoted in McHugo J, *Resoluton 242: a legal appraisal of the right-wing Israeli interpretation of the withdrawal phase with reference to the conflict between Israel and the Palestinians*, 51 International and Comparative Law Quarterly 851 (2002) 852. See also Rosenne M, *Understanding UN Security Council resolution 242 of November 22, 1967, on the Middle East*, in *Defensible borders for a lasting peace* (<www.defensibleborders.org>: 2008) 45.

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Israel's policy need not be restated in full. We shall maintain and respect the cease-fire situation until it is replaced by peace treaties ending the state of war, determining the agreed and secure national frontiers of States and ensuring a stable and mutually guaranteed security. We cannot return to the shattered armistice regime. We should not seek to return to any system of relations other than a permanent, contractually binding peace; and we agree with those who have said, in the General Assembly and elsewhere, that fragile armistices and armistice lines must be superseded by agreed and secure national boundaries.²²⁸

This is a clear rejection of any withdrawal to the armistice demarcation lines as they existed on 5 June 1967. In response to this, the USSR representative observed:

115. You will recall that at the 1373rd meeting of the Security Council the Soviet delegation...asked the United States delegation what its attitude was to the question of the withdrawal of troops. Today, though we tried hard to find a clear answer to that question somewhere in the very long statement of the United States representative, our efforts were unsuccessful. I should therefore like to return to that part of the Soviet statement which referred to this matter and draw the attention of the Council to it. We said at the time:

"The absence from the United States text of any substantial clarification of what is meant by the withdrawal of troops 'from all' territories, and the exclusion of any reference to the fact that the subject under discussion is the recent conflict, must be considered in conjunction with the appearance in the United States draft of phrases such as 'secure and recognized boundaries'. What boundaries does this refer to? What is behind the idea of 'secure and recognized boundaries'? Who is to decide how secure these boundaries are and who has to recognize them? To all these questions the

²²⁸ Eban, representative of Israel, SCOR, 1377th meeting (15 November 1967), S/PV.1377, para.105.

United States draft provides no answer but leaves the field wide open for different interpretations and constructions, including interpretations which still make it possible for Israel itself arbitrarily to establish new boundaries and to withdraw its forces only to those lines it considers appropriate. And the interpretations by Israel, which asserts that the General Armistice Agreements of 1949 approved by the Security Council are not binding on it, go very far." [1373rd meeting, para.152.]

116. We know from the statements of Israel statesmen, and in particular from that made yesterday by the Minister for Foreign Affairs of Israel and just published in The New York Times, that Israel makes a definite claim to keep some of the territories seized from the Arab States.

117. Consequently, the United States draft leaves open the possibility that Israel's forces may not be withdrawn from all the Arab territories they have seized and that part of these territories may be kept by Israel...It is obvious that the provision for the withdrawal of troops must be so clearly formulated as to leave no loopholes whereby anyone can interpret it in his own way.²²⁹

After the unanimous adoption of resolution 242, Israel reiterated that its reference to "secure and recognized boundaries" precluded a return to the armistice lines, which never had been regarded as boundaries. To require Israel to do so had "no logical or moral international basis": the establishment of a peace settlement, which included secure and recognised boundaries, could not lie in a withdrawal "without final peace, to demarcation lines."²³⁰ This statement was also criticized by the representative of the USSR who claimed that it demonstrated that Israel did not intend to co-operate with either the United Nations or Security Council "in seeking a swift political settlement in the Near East in accordance with the resolution just adopted."²³¹

²²⁹ Kuznetsor, representative of the USSR, SCOR, 1377th meeting (15 November 1967), S/PV.1377, paras.115-117.

²³⁰ Eban, representative of Israel, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, paras 88 and 93.

²³¹ Kuznetsor, representative of the USSR, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, para.121.

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Moreover, the debates within the Security Council demonstrated that Israel's claim that it need not withdraw to the armistice lines was not a view shared by the majority of the voting members. As McHugo points out, ten of the fifteen voting members expressly stated that resolution 242 provided that Israel had no right to acquire any of the territories it occupied during the Six Days War, and thus it had to withdraw from all these territories:²³² two of the non-voting participants, the United Arab Republic and Jordan, also expressed this understanding.

The Security Council is a political body: it approaches issues before it in the round, particularly in a situation which engages its "primary responsibility for the maintenance of international peace and security," and accordingly respect for international law is only one of the factors in its deliberations. In order to achieve a text which will gain the adhesion of a majority of the Council, and in the case of resolution 242 the assent and co-operation of the parties to the dispute, creative ambiguity may be employed as a drafting technique.²³³ The United States, in particular, wanted the adoption of a resolution which the disputant parties would implement, and thus argued against the terms of operative paragraph 1.I, "Withdrawal of Israeli armed forces from territories occupied in the recent conflict," being qualified by the insertion of "the" or "all" before "territories". It knew that this would alienate Israel.²³⁴ Its position remained

²³² McHugo, above n.227 (*Resolution 242*), 870-871. See the statements of Makonnen, representative of Ethiopia, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, para.33; Parthasarathi, representative of India, *ibid*, paras.46 and 50-52; Caradon, representative of the United Kingdom, paras.56-59; Adebo, representative of Nigeria, *ibid*, para.76; Berard, representative of France, *ibid*, paras.111-112; Kuznetsor, representative of the USSR, paras.118-121; de Carvalho Silos, representative of Brazil, para.127; Tarbanov, representative of Bulgaria, *ibid*, paras.139-141; Ruda, representative of Argentina, *ibid*, para.162-163; and Kanti, representative of Mali, *ibid*, para.189. See also Lynk, above n.206 (*Legal foundations*), 12-14 and 16-17.

²³³ See Wood, above n.217 (*Interpretation*), 82; Goldberg, the United States Ambassador to the United Nations when resolution 242 was adopted, and one of its principal negotiators, argues that 242 is ambiguous—see Goldberg, above n.224 (*Resolution 242*), 191; and also Bassiouni MC, *An analysis of Egyptian peace policy toward Israel: from resolution 242 (1967) to the 1979 Peace Treaty*, 12 *Case Western Reserve Journal of International Law* 3 (1980) 4-6. On the textual ambiguities in resolution 242, and their impact on the Peace Process, see Dajani OM, *Forty years without resolve: tracing the influence of Security Council resolution 242 on the Middle East Peace Process*, 37 *Journal of Palestine Studies* 24 (2007).

²³⁴ See, for instance, XIX FRUS 1964-68, Doc.524, *Memorandum from Nathaniel Davis of the National Security Council Staff to the President's Special Assistant*

consistent, namely that “changes in [the] 1949 Armistice lines are inevitable and desirable and are foreseen under [the] terms of [the] Armistice agreements.” Nevertheless, these changes should not be an “excuse for territorial expansion as such”, and that extensive changes would be incompatible with the United States’ position.²³⁵

Any perceived ambiguities in the meaning of resolution 242, however, must be judged in the light of interpretative declarations made by members of the Security Council during the process of adopting the resolution.²³⁶ Ten of its fifteen members stated that Israel had to withdraw from all the territories it occupied and return to the armistice lines as these existed on 4 June 1967. Of the five permanent members, China said little in the Security Council debates while the United States was committed to withdrawal to slightly modified lines which took account of Israel’s security concerns. The USSR consistently argued that Israel should withdraw to the 4 June lines: France and the United Kingdom may also be seen to incline to this position. Israel rejected this broad consensus unequivocally:

It is basic to Israel’s position that peace requires secure and recognized boundaries and not return to the June 4 lines. Israel’s refusal to restore the June 4, 1967 situation is absolute, basic and irrevocable. To avoid returning to the June 4 lines is of supreme national interest which Israel considers worthy of all tenacity and sacrifice.²³⁷

B. RESOLUTION 242 AND THE PALESTINIANS

No invitation to participate in the deliberations of the Security Council was extended to representatives of the Palestinian Arabs, no doubt because it was not envisaged that an autonomous Palestinian State should be created on the West Bank. Syria,

(Rostow), 13 November 1967, 1032; and Doc.528, *Telegram from the Mission to the United Nations to the Department of State*, 18 November 1967, 1039 at 1040. See also Lynk, above n.206 (*Legal foundations*), 16.

²³⁵ XX FRUS 1964-68, Doc.362, *Telegram from the Department of State to the Embassy in Israel*, 25 December 1968, 719 at 720.

²³⁶ See Wood, above n.217 (*Interpretation*), 93-94.

²³⁷ XX FRUS 1964-68, Doc.361, *Telegram from the Department of State to the Embassy in Israel*, 24 December 1968, 717 at 717-718, transmitting the text of a 23 December 1968 Israeli aide-mémoire.

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however, commented:

7. But as one looks around this Council table, when the future of a whole area and the destiny of a whole people are being decided on, one is struck by an anomalous fact, namely, that the party directly concerned, the Arab people of Palestine, who should themselves be the first speakers to be heard—since they have never ceded their inalienable rights to anybody nor forfeited them—are totally absent from the picture. No reference is made to them in the draft resolution, except, belatedly, in sub-paragraph (b) of operative paragraph 2, as constituting the refugee problem. Yes, this is the Arab people of Palestine, the uprooted, dispossessed people in exile, crying for justice for over twenty years now, without so far finding justice in the councils of the world.

8. The United Nations Charter, the Universal Declaration of Human Rights, indeed, all the international documents pertaining to the unhappy history of Palestine, were not meant in any way to deprive peoples of their inalienable rights to self-determination in their own lands and their right to their homeland in which they had lived for over two thousand years; what is of pertinence here is enshrined in Article I of the Charter, to which no reference whatsoever is made in the United Kingdom draft resolution.²³⁸

Accordingly, like General Assembly resolution 181, Security Council resolution 242 may be said to be a *res inter alios acta* for Palestinian Arabs because they were not involved in the process of its adoption. Nevertheless, the explanatory note which accompanied the Algiers Declaration of Independence of the State of Palestine promulgated by the Palestine National Council on November 15, 1988, called for an international peace conference

²³⁸ Tomeh, representative of Syria, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, paras.7-8. Formally, under the terms of Article 32 of the UN Charter, the representatives of Palestinian Arabs were ineligible to receive an invitation to participate in the Security Council deliberations because Palestine is not a State, but non-State actors may participate without vote in Security Council meetings by virtue of Rule 39 of its Provisional Rules of Procedure—see Dolzer R, *Commentary on Article 32*, in Simma, above n.62 (*UN Charter*), 580 at 581.

to be convened on the basis of United Nations Security Council resolutions 242 and 338. Similarly, the PLO's formal recognition of Israel's right to exist "in peace and security" contained in Chairman Arafat's 9 September 1993 letter to Prime Minister Rabin made an express acceptance of Security Council resolutions 242 and 338,²³⁹ while Article 1 of the 1993 Declaration of Principles on Interim Self-Government Arrangements provided that negotiations on permanent status would lead to the implementation of these resolutions. Finally, the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip affirmed in its preamble the parties' understanding:

that the interim self-government arrangements contained in this Agreement are an integral part of the whole peace process, that the negotiations on the permanent status, that will start as soon as possible but not later than May 4, 1996, will lead to the implementation of Security Council Resolutions 242 and 338.

Resolution 338, adopted on 22 October 1973, called for a cease-fire in the Yom Kippur War, and provided:

The Security Council

1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;
3. Decides that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices

²³⁹ Chairman Arafat's letter, and Prime Minister Rabin's reply, which expressly recognised the PLO as the legitimate representative of the Palestinian people, are reproduced at 7 *Palestine Yearbook of International Law* (1992-1994) 230-231.

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aimed at establishing a just and durable peace in the Middle East.

While some²⁴⁰ argue that the use of “decides” in the third operative paragraph of resolution 338 makes resolution 242 binding, this is rather a strained interpretation because the second operative paragraph uses non-mandatory language. Furthermore, had resolution 338 been intended to make resolution 242 binding, it might be expected that this should have given rise to debate on that issue within the Security Council, but the relevant volume of the *Repertory of Practice of United Nations Organs* states:

During the period covered by this Supplement, there was no constitutional debate concerning the application or interpretation of Article 25²⁴¹ in the Security Council. Nor did such discussion occur in the General Assembly.²⁴²

Accordingly, the better view appears to be that resolution 242 remains merely a recommendation issued by the Security Council, but that does not exhaust discussion of its normative significance given the repeated reaffirmation by both Israel and the PLO that it should be implemented. Although resolution 242 was adopted under Chapter VI of the UN Charter, if it embodies legal principles which are binding in themselves, their obligatory force is independent of, or not dependent upon, the nature of the instrument in which they are contained. This is of particular relevance to the affirmation in the preamble to resolution 242 of the principle that territory cannot be acquired through the use of force.

²⁴⁰ For example, see Rostow, above n.218 (*Illegality of the Arab attack*), 275, and above n.135 (*Palestinian self-determination*), 162.

²⁴¹ Article 25 of the UN Charter provides, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. For commentary, see Delbrück J, *Commentary to Article 25*, in Simma, above n.62 (*UN Charter*), 452-464; and Suy E, *Article 25*, in Cot and Pellet, above n.72 (*La Charte*), 471-478.

²⁴² *Repertory of Practice of United Nations Organs*, Supplement No.5 (1970-1978), *Extracts relating to Article 25 of the United Nations Charter*, 35, para.1.

X. PROHIBITION OF THE ACQUISITION OF TERRITORY THROUGH THE USE OF FORCE

Until the early years of the C20th, conquest was a recognised basis for title to territory: a State could lawfully acquire territory through the use of force. During the course of the C20th, this traditional rule of international law was decisively reversed by two key substantive developments,²⁴³ namely the incremental prohibition of the use of force in international relations, which culminated in the adoption of Article 2.4 of the United Nations Charter,²⁴⁴ and the emergence of the principle of self-determination as “one of the essential principles of contemporary international law.”²⁴⁵ As both embody aspects of international public order, they may be viewed as *ius cogens* norms, that is norms from which no derogation is allowed, which are also obligations owed to the international community as a whole.²⁴⁶

The core implications of these norms for States is that they are under a duty not to recognize territorial changes brought about by virtue of the use of force, which is essentially a negative duty of abstention,²⁴⁷ but they also have a positive duty to promote

²⁴³ For a detailed exposition of the emergence and consolidation of the illegality of territorial acquisition through the use of force, see Korman, above n.39 (*Conquest*): see also Lynk, above n.206 (*Legal foundations*), 18-19.

²⁴⁴ This provides, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. For commentary, see Randelzhofer A, *Commentary to Article 2(4)*, in Simma, above n.62 (*UN Charter*), 112-136; and Virally M, *Article 2: paragraphe 4*, in Cot and Pellet, above n.72 (*La Charte*), 115-128.

²⁴⁵ *East Timor case* (Portugal v Australia), ICJ Rep, 1995, 90 at 102, para.29.

²⁴⁶ The International Court of Justice, using the then-current terminology of obligations *erga omnes*, declared self-determination as an obligation owed to the international community as a whole in the *East Timor case*, see ICJ Rep, 1995, 102, para.29; reaffirmed in the *Legal consequences of the construction of a wall advisory opinion*, ICJ Rep, 2004, 136 at 172, para.88.

²⁴⁷ On the duty of non-recognition in response to an unlawful territorial situation, see the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, ICJ Rep, 1971, 16 at 54-56, paras.117-127. See also International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to*

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the realization of the right of self-determination in non-self governing territories. In relation to these fundamental norms, General Assembly resolution 2625 (XXV)(24 October 1970), which was entitled *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, stated:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of any State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect...

Every State has the duty to refrain from any forcible action which deprives peoples...of their right to self-determination and freedom and independence...

...No territorial acquisition resulting from the threat or use of force shall be recognised as legal...

Every State has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle...

Although, in principle, resolutions adopted by the General Assembly are not binding but are merely recommendations, resolution 2625 is generally accepted to be an authoritative

Article 41 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts, 113 at 114, para.6, available at <<http://untreaty.un.org/ilc/reports/2001/2001report.htm>>; II.ii Yearbook of the International Law Commission (2001), UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), 113 at 114, para.6; and also Crawford, above n.57 (*State responsibility*), *Commentary to Article 41*, 249 at 250, para.6. The question of non-recognition will be examined in Scobbie and Hibbin, *The Israel-Palestine conflict in international law: recognition issues* (forthcoming).

interpretation of the fundamental legal principles expressed in the provisions of the UN Charter.

In the *Legal consequences of the construction of a wall* advisory opinion, the International Court relied, *inter alia*, on resolution 2625 in its exegesis of the norms concerning the prohibition of the use of force and self-determination.²⁴⁸ In particular it ruled:

the principles as to the use of force incorporated in the Charter reflect customary international law...; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.²⁴⁹

This ruling reflects settled international practice since at least the adoption of the UN Charter, although vestiges of this approach were apparent in the inter-war period, stemming from Article 10 of the Covenant of the League of Nations²⁵⁰ and the 1928 General Treaty for the Renunciation of War (the Kellogg-Briand Pact), which was expressed in policies such as the Stimson doctrine of non-recognition.²⁵¹

With regard to the acquisition of territory by States, the doctrine of *terra nullius*²⁵² is no longer operative: territory open to acquisition by any State no longer exists. In principle, all territory is either subject to the sovereignty of a State (or at least sovereignty may be contested by two or more States) or, in the case of a non-self-governing territory, by virtue of self-determination, to the residual sovereignty of the indigenous inhabitants.²⁵³ Should State territory, in whole or part, be occupied

²⁴⁸ See, eg, ICJ Rep, 2004, 171-172, paras.87-88 and 199, para.156.

²⁴⁹ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171, para.87.

²⁵⁰ This provided, "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled".

²⁵¹ On the Stimson doctrine see, eg, Trone J, *The Stimson doctrine of non-recognition of territorial conquest*, 19 University of Queensland Law Journal 160 (1996-1997); and Turns D, *The Stimson doctrine of non-recognition: its historical genesis and influence on contemporary international law*, 2 Chinese Journal of International Law 105 (2003).

²⁵² See above, text to n.39.

²⁵³ On the specific case of Israel/Palestine as mandated territory which could not be considered as *res nullius*, see Blum, above n.26 (*Missing reversioner*) 282-283:

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by another State as the result of hostilities, the law of belligerent occupation precludes its annexation. This is a consequence of Article 43 of the Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land which provides in part:

The authority of the legitimate power having in fact passed into the hands of the occupant...

This entails that the occupant's authority in the territory occupied replaces that of the legitimate displaced sovereign as a practical matter, but this cannot amount to a claim to sovereignty over the territory. As a consequence of self-determination, the occupation of territory which is not self-governing, where sovereignty is not vested in any State, cannot give a licence for annexation by the occupying power. This would amount to an attempt to deprive the inhabitants of that territory of the exercise of their right to self-determination through the use of force, thus contradicting one of "the essential principles of contemporary international law."

Nor can an occupant dismember a non-self-governing territory in order to annex only part of it. In the separate opinion he appended to the *Legal consequences of the construction of a wall* advisory opinion, Judge Koroma observed, "Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal."²⁵⁴ This simply restates the established position that the territorial integrity of a self-determination unit²⁵⁵ cannot be disrupted, particularly by a belligerent occupant:

If an occupant controlled only part of a state and that part was not considered to be a distinct unit entitled to self-determination, the occupant would not be entitled to effect the secession of the occupied area (as in Northern Cyprus). Similar considerations imply that the occupant would not be entitled to establish a new government in such a region even if its inhabitants supported such an

and, generally, above text to n.39-43.

²⁵⁴ *Legal consequences of the construction of a wall* advisory opinion, separate opinion of Judge Koroma, ICJ Rep, 2004, 204 at 205, para.4.

²⁵⁵ On the territorial integrity of self-determination units, albeit within the context of decolonisation, see, eg, Cassese A, *Self-determination of peoples: a legal reappraisal* (Cambridge UP: Cambridge: 1995), 72 and 78-79.

act.²⁵⁶

In the interpretation of resolution 242, some commentators contrast the affirmation of “the inadmissibility of the acquisition of territory by war” contained in the second preambular paragraph and the injunction of the “withdrawal of Israeli armed forces from territories occupied in the recent conflict” contained in operative paragraph 1.i, with the reference to “secure and recognised boundaries” in operative paragraph 1.ii.²⁵⁷ Blum, for instance, claims that the intentional omission of “the” before “territories” means that Israel was not required to withdraw to the armistice lines, as withdrawal is subject to the delineation of secure boundaries.²⁵⁸ He simply brushes over the prohibition of the acquisition of territory through the use of force, arguing that any departure from the armistice lines in the construction of secure boundaries for Israel would have to be agreed by the parties concerned, and thus title to the areas concerned would arise through cessation, and not conquest.

The thrust of Blum’s argument is disingenuous. While resolution 242 is, formally, merely a recommendation adopted under Chapter VI of the UN Charter, the prohibition on the acquisition of territory through the use of force is a binding rule of international law. Some claim, although this is contested, that the Security Council can disregard or vary the legal obligations of the parties when it is dealing with a dispute if this is embodied in a decision, in other words when the Security Council invokes and acts under Chapter VII of the UN Charter.²⁵⁹ By virtue of Article 25

²⁵⁶ Benvenisti E, *The international law of occupation* (Princeton UP: Princeton: 1993) 183; see also Roberts A, *The end of occupation: Iraq 2004*, 54 *International and Comparative Law Quarterly* 27 (2005), 28-29; and Sassòli M, *Article 43 of the Hague Regulations and peace operations in the twenty-first century*, <<http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf>>, 14.

²⁵⁷ See, for example, Blum YZ, *Secure boundaries and Middle East peace in the light of international law and practice* (Hebrew University: Jerusalem: 1971) 63 *et seq.*; see also Goldberg, above n.224 (*Resolution 242*) 190-191.

²⁵⁸ Blum, above n.257 (*Secure boundaries*), 72-76.

²⁵⁹ See, for instance, Kelsen H, *The law of the United Nations: a critical analysis of its fundamental problems* (Stevens: London: 1950) 385; for an overview of this question, see Higgins R, *The place of international law in the settlement of disputes by the Security Council*, 64 *American Journal of International Law* 1 (1970). The desire to ensure that the Security Council adheres to international law in its decision making is at the root of arguments that the International Court of Justice should exercise judicial review over its decisions—see, for example, Bedjaoui M, *The new world order and the Security Council: testing the legality of its acts* (Nijhoff:

of the UN Charter, Security Council decisions are binding on member States and prevail over their other legal obligations by virtue of Article 103.²⁶⁰ As Wood observes, this is a matter which depends on the intentions of the Security Council:

If it appears that the Council was intending to lay down a rule irrespective of the prior legal obligations of States, in general or in particular, then that intention would prevail; if, conversely, it appears that the Council was intending to base itself on existing legal rules or an existing legal situation, then its decisions ought certainly to be interpreted taking those rules into account.²⁶¹

As resolution 242 was adopted under Chapter VI of the UN Charter, it is merely a non-binding recommendation. Its terms cannot over-ride binding law. Accordingly the question whether Articles 25 and 103 of the UN Charter combine to allow the terms of resolution 242 to pre-empt the legal prohibition on the acquisition of the territory through the use of force does not arise.

Moreover, it is doubtful whether the Security Council is legally competent to adopt a resolution which disregards the prohibition on the acquisition of territory through the use of force. As the International Court affirmed in the *Legal consequences of the construction of a wall* advisory opinion, this prohibition is a corollary of the prohibition of the threat or use of force in international relations,²⁶² therefore it presumably shares the *ius cogens* status of the latter.²⁶³ As Judge *ad hoc* Lauterpacht has

Dordrecht: 1994).

²⁶⁰ See *Case concerning questions of interpretation and application of the 1979 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom): order of 14 April 1992 (request for the indication of provisional measures)*, ICJ Rep, 1992, 3 at 15, para.39. Article 103 of the UN Charter provides, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail": for commentary, see Bernhardt R, *Commentary on Article 103*, in Simma, above n.62 (*UN Charter*), 1292-1303; and Flory T, *Article 103*, in Cot and Pellet, above n.72 (*La Charte*), 1381-1389.

²⁶¹ Wood, above n.217 (*Interpretation*), 92.

²⁶² See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171, para.87.

²⁶³ The peremptory status of the prohibition of the acquisition of territory by the use of force, particularly in the context of a denial of the right to self-determination, was affirmed by the International Law Commission in its *Report of the work of its*

observed, the relief which Article 103 affords to the Security Council where there is a conflict between one of its decisions and an obligation arising under customary or conventional international law cannot, as a simple matter of norm hierarchy, extend to a conflict between a Security Council resolution and a peremptory *ius cogens* norm.²⁶⁴ Further, Judge *ad hoc* Lauterpacht speculates that a Security Council resolution adopted in breach of a *ius cogens* norm would be void and legally ineffective.²⁶⁵

Blum further contends that the prohibition on the acquisition of territory through the use of force is relevant only to territory occupied by Israel which lies beyond the boundaries of Mandate Palestine, and has no application to the “formerly Palestinian territories” which were invaded by Arab States in 1948. As this invasion was an unlawful use of force under Article 2.4 of the UN Charter, he argues that this could not give rise to valid claims of title to that territory. He asserts:

The legal standing of Israel in these territories is therefore—irrespective of the conclusion or otherwise of any formal territorial settlement between her and her neighbours—that of a State which—as a result of measures of self-defense taken by it against forces that had unlawfully entered Palestinian territory with a view to crushing her—is lawfully in control of territories in respect of which no other State can show better title.²⁶⁶

This is simply beside the point, and demonstrates the effacement of the rights of the Palestinian Arab population from the question in the period immediately following the Six-Day War. The territory

53rd session, UN Doc.A/56/10, *Commentary to Article 41 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts*, 113 at 114-115, paras.5-8, available at <<http://untreaty.un.org/ilc/reports/2001/2001report.htm>>; II.ii Yearbook of the International Law Commission (2001), UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), 113 at 114-115, para.5-8; and also Crawford, above n.57 (*State responsibility*), *Commentary to Article 41*, 249 at 250-251, para.5-8.

²⁶⁴ *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro): order of 13 September 1993 (further requests for the indication of provisional measures)*, ICJ Rep, 1993, 325, separate opinion of Judge *ad hoc* Lauterpacht, 407 at 440, para.100: see 439-442, paras.98-107 generally.

²⁶⁵ *Application of the Genocide Convention case: order of 13 September 1993*, separate opinion of Judge *ad hoc* Lauterpacht, ICJ Rep, 1993, 441, para.104.

²⁶⁶ Blum, above n.257 (*Secure boundaries*), 80-90, quotation at 90.

of Mandate Palestine was not *terra nullius*, and accordingly not liable to acquisition by any external State such as Jordan or Egypt, and Israel has disavowed any claim that it is the successor State to Mandate Palestine, established on the entirety of its territory. While the demarcation lines set out in the 1949 Armistice Agreements were not formal *de iure* international boundaries (with the exception of that between Israel and Lebanon), and the parties had expressly reserved their rights in the Agreements, they did delineate areas which were manifestly not part of Israel. Accordingly, it is misleading to argue that the prohibition on the acquisition of territory through the use of force did not apply to Israel in relation to territory beyond the armistice lines which once had formed part of Mandate Palestine. As Rosenne wrote when he was legal adviser to Israel's foreign ministry, "any party claiming a revision of the armistice demarcation line [would have to] establish that it had rights to a different line"²⁶⁷ as it was probable that they were "indistinguishable from international frontiers proper."²⁶⁸ Accordingly, just as Jordan could not gain title to the West Bank, or Egypt to Gaza, as the result of invasion and occupation, Israel could not and cannot do so either.

²⁶⁷ Rosenne, above n.37 (*Israel's Armistice Agreements*), 49.

²⁶⁸ Rosenne, above n.37 (*Israel's Armistice Agreements*), 47.

XI. ACQUISITION OF TERRITORY AND SELF-DEFENSE

If a State uses force in order to settle a territorial dispute, it cannot claim that this is justified as an exercise of self-defense.²⁶⁹ Gerson contends that States that have unlawfully gained control over foreign territory should be treated differently regarding a right to retain or acquire title to this territory than States which have gained control lawfully through the exercise of self-defense.²⁷⁰ He asserts:

the lawful-unlawful dichotomy has no application to the management sphere of occupation, but only to the acquisition of held territory, insofar as claims to potential acquisition of title by aggressor-occupants are not recognized.²⁷¹

The implication is that a State which has been subjected to an armed attack and lawfully used force in self-defense that has resulted in the occupation of enemy territory may unilaterally annex territory belonging to the aggressor. Authorities are divided on the correctness of this position. Some argue that a State may unilaterally annex territory if it has used force lawfully in self-defense: many of these analyses are expressly tied to the situation existing in Israel/Palestine after 1967.²⁷² International practice does not unequivocally support this proposition. In the post-WWII

²⁶⁹ See, eg, Eritrea-Ethiopia Claims Commission, *Partial award on jus ad bellum (Ethiopia's claims 1-8)* (19 December 2005), <www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>, 3-4, para.10: reproduced 45 International Legal Materials 430 (2006).

²⁷⁰ Gerson, above n.25 (*Israel, West Bank*), 13-16.

²⁷¹ Gerson, above n.25 (*Israel, West Bank*), 21.

²⁷² See, in particular, Blum, above n.257 (*Secure boundaries*) 90, and above n.9 (*Jerusalem*), 20-21; Goodhart AL, *International law relating to occupied territory*, 87 Law Quarterly Review 298 (1971) 293; Lauterpacht, above n.112 (*Jerusalem*) 42-46 (regarding the expansion of Israel beyond the boundaries indicated in the UN Partition Plan) and 51-52 (regarding East Jerusalem); Rosenne, above n.227 (*Resolution 242*) 49; and Schwebel S, *What weight to conquest?*, 64 American Journal of International Law 64 (1970), and republished in Schwebel, *Justice in international law* (Grotius/Cambridge UP: Cambridge: 1994) 521.

territorial settlements, there were examples of what is termed “defensive conquest” where victorious States which had been attacked were allowed to annex territory in order to acquire more defensible boundaries: for instance, the USSR’s expansion into Poland, and the consequent expansion of Poland eastwards to the Oder-Neisse line, as well as the USSR’s acquisition of South Sakhalin and the Kurile Islands.²⁷³ These examples belong to the period before the UN Charter and may be seen to contradict post-WWI practice when, for instance, France’s assertion of the defensive conquest of territory up to the Rhine frontier was denied.²⁷⁴ Further, in contemporary international law, it is difficult to reconcile defensive conquest with the principle of self-determination, unless this is consonant with the freely expressed views of the inhabitants of that territory. There is, however, a presumption against the validity of territorial changes occurring during a period of occupation.²⁷⁵ The most prominent contemporary example is the Turkish Republic of Northern Cyprus.²⁷⁶

Moreover, defensive conquest cannot be reconciled with the strict parameters placed on self-defense. Under both Article 51 of the UN Charter²⁷⁷ and customary international law, in order to be lawful, forcible measures taken in self-defense must be both necessary and proportionate to meet the immediate threat posed to the State attacked. As Jennings observes:

Force used in self-defence...must be proportionate to the threat of immediate danger, and when that threat has been averted the plea of self-defence can no longer be available. It is true that it may not be easy to say when this point is reached and that to some extent at least it is a

²⁷³ See Korman, above n.39 (*Conquest*), 168-175 and 204.

²⁷⁴ See Korman, above n.39 (*Conquest*), 147-149.

²⁷⁵ See Crawford, above n.16 (*Creation of States*), 74-76 and 131 *et seq*; and also Marek K, *Identity and continuity of States in public international law* (Droz: Geneva: 1968, second edn) 73-126.

²⁷⁶ See Crawford, above n.16 (*Creation of States*), 143-147.

²⁷⁷ This provides in part, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”. For commentary, see Cassese A, *Article 51*, in Cot and Pellet, above n.72 (*La Charte*), 771-795; and Randelzhofer A, *Commentary to Article 51*, in Simma, above n.62 (*UN Charter*), 788-806.

matter for the judgement of the actor. But when all allowance is made for the “rough jurisprudence of nations”, it must still be said that it would be a curious law of self-defense that permitted the defender in the course of his defence to seize and keep the resources and territory of the attacker.²⁷⁸

This proposition has preponderant support in the literature,²⁷⁹ as the use of force in self-defense is an exception to the general prohibition on the use of force, and is thus restricted to the preservation or restoration of the *status quo ante*. It is force employed in response to an armed attack, rather than a measure taken in contemplation of a contingent future attack,²⁸⁰ as the unanimous Security Council condemnation of Israel’s destruction in 1981 of a near-complete nuclear reactor in Iraq, ostensibly on grounds of self-defense, demonstrates.²⁸¹ Further, as Greig observes, even if territory were gained by virtue of a lawful use of force, it would become an illegal use of that force to attempt to change the status of that territory as this would go beyond the ambit of self-defense.²⁸² This would no longer be a proportionate use of force, because the measures adopted would go beyond those required to meet the immediate threat posed, nor would annexation be necessary to achieve that end. This conclusion is evident in the international community’s rejection of Israel’s

²⁷⁸ Jennings RY, *The acquisition of territory in international law* (Manchester UP: Manchester: 1963) 55.

²⁷⁹ See, for instance, Bowett DW, *International law relating to occupied territory: a rejoinder*, 87 Law Quarterly Review 473 (1971) 475; Greig DW, *Self-defence and the Security Council: what does Article 51 require?*, 40 International and Comparative Law Quarterly 366 (1991) 396-397; and Korman, above n.39 (*Conquest*) 203 *et seq.* Bowett’s ingenious rejection of Goodhart’s thesis (above n.272 (*Occupied territory*)) based on Article 40 of the UN Charter is, unfortunately, vitiated by a UN document which would not have been available at the time he was writing—the *Repertoire of the practice of the Security Council 1966-1968* (UN Doc.ST/PSCA/1/Add.5) expressly states (at 200-201) that no Security Council decision expressly or implicitly invoked Article 40 during this period, although a few incidental references had been made to it in discussions on Palestine.

²⁸⁰ See, eg, Jennings, above n.278 (*Territory*), 55; and Korman, above n.39 (*Conquest*), 205.

²⁸¹ Security Council resolution 487 (1981): Security Council debate (UN Doc.S/PV.2280, 12 June 1981) reproduced 20 International Legal Materials 965 (1981): but compare Zedalis RJ, *Preliminary thoughts on some unresolved questions involving the law of anticipatory self-defense*, 19 Case Western Reserve Journal of International Law 129 (1987).

²⁸² Greig, above n.279 (*Self-defence*), 396.

purported annexation of East Jerusalem and the Golan Heights on the grounds of defensive conquest.²⁸³

It follows that, even if force has been used in self-defense, a State may not unilaterally annex territory in order to acquire more “secure” or strategic borders. Authorities are, however, again divided on this. Blum argues that defensive considerations are of “primordial importance” in the determination of new boundaries, where no previous boundaries exist or where, following conflict, boundaries need to be determined anew as part of a peace settlement. He further claims that strategic considerations are so significant that criteria such as race, language, religion and economic considerations may be overridden.²⁸⁴ Jennings and Korman concede that boundaries might need to be changed after conflict, but are clear that this cannot be achieved unilaterally.²⁸⁵ Any boundary changes must be freely agreed between the parties in a post-conflict settlement, although if one party imposed terms by threatening subsequent conflict should its terms not be accepted, by virtue of Article 52 of the 1969 Vienna Convention on the Law of Treaties, this settlement would be void.²⁸⁶

Operative paragraph 1.ii of resolution 242 stated that the establishment of a just and lasting peace in the Middle East required recognition of the right of every State in the area “to live in peace within secure and recognized boundaries free from threats or acts of force.” In the negotiations and diplomatic exchanges aimed at implementing resolution 242, Israel sought secure boundaries with the United Arab Republic/Egypt and Jordan. Syria had refused to accept resolution 242. The areas in contention were therefore Gaza, Sinai and the West Bank, as Israel would not countenance renouncing East Jerusalem.²⁸⁷ The

²⁸³ See Korman, above n.39 (*Conquest*), 256-257 and 260-267.

²⁸⁴ Blum, above n.257 (*Secure boundaries*), 22-24.

²⁸⁵ Jennings, above n.278 (*Territory*), 56 *et seq*; Korman, above n.39 (*Conquest*), 207 *et seq*.

²⁸⁶ Article 52 provides, “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”. For the International Law Commission’s commentary on this Article, see Watts AD, *The International Law Commission 1949-1998. Vol.II: The treaties* (Oxford UP: Oxford: 1999) 738-740.

²⁸⁷ On Israel’s refusal to contemplate renunciation of East Jerusalem, see, eg, XX FRUS 1964-68, Doc.213, *Telegram from the Embassy in Israel to the Department of State*, 17 July 1968, 410 at 415; Doc.217, *Telegram from the Embassy in Jordan to the Department of State*, 17 July 1968, 424 at 425-426; Doc.268, *Telegram from Secretary of State Rusk to the Department of State*, 1 October 1968, 529 at 532; Doc.346, *Telegram from the Embassy in Israel to the Department of State*, 11

adoption of the Khartoum resolution by the Arab League on 1 September 1967 prohibited direct negotiations between its member States and Israel, but bilateral secret negotiations took place between Israel and Jordan. Attempts to secure the implementation of resolution 242 were also undertaken by Jarring who, pursuant to the terms of resolution 242, had been appointed by the UN Secretary-General as his special representative “to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution.”²⁸⁸

Israel was adamant that changes in the Armistice Lines were necessary in order that it could possess secure frontiers. In relation to the West Bank, an early formulation of how these might be achieved was the Allon Plan, which called for a series of settlements along the River Jordan and the demilitarization of those areas which would be returned to Jordan.²⁸⁹ Although some members of the Israeli Cabinet thought that this did not go far enough in incorporating the occupied territories into Israel and threatened to resign,²⁹⁰ variants of the Allon Plan formed the basis of the peace terms Israel offered to Jordan in their bilateral negotiations.²⁹¹ Israel laid claim to “certain unpopulated areas of

December 1968, 685 at 686; and Doc.373, *Telegram from the Embassy in Jordan to the Department of State, 30 December 1968*, 736 at 738. It may be recalled that on 27 June 1967, the Knesset promulgated the Law and Administration Ordinance (Amendment No.11) Law which provided that “the law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order”. The next day, the Israeli Government proclaimed new boundaries for the city of Jerusalem which incorporated those parts of East Jerusalem which previously had been under Jordanian administration.

²⁸⁸ On the Jarring mission, see Mork HK, *The Jarring mission: a study of the UN peace effort in the Middle East, 1967-1971* (MA Thesis in History: University of Oslo: 2007), available at <www.duo.uio.no/publ/IAKH/2007/58588/HuldaxMxrxxxMasteroppgavexixhistorie.pdf>.

²⁸⁹ See XX FRUS 1964-68, Doc.410, *Telegram from the Embassy in Israel to the Department of State, 17 July 1968*, 410 at 415; and Doc.217, *Telegram from the Embassy in Jordan to the Department of State, 17 July 1968*, 424 at 424 and 426. For an account of the Allon Plan and illustrative map, see Steinitz Y, *Defensible borders in a historical context*, in *Defensible borders for a lasting peace* (<www.defensibleborders.org>: 2008) 12-13.

²⁹⁰ XX FRUS 1964-68, Doc.329, *Information memorandum from the President's Special Assistant (Rostow) to President Johnson, 22 November 1968*, 655 at 655 n.2.

²⁹¹ See XX FRUS 1964-68, Doc.268, *Telegram from Secretary of State Rusk to the Department of State, 1 October 1968*, 529 at 529 and 531-532; Doc.326, *Telegram from the Embassy in Israel to the Department of State, 19 November 1968*, 644 at 648

[the] West Bank” which the US Embassy in Jordan identified could only lie along the ceasefire line between Israel and Jordan, namely, along the River Jordan.²⁹² King Hussein of Jordan reported that Israel’s specific territorial demands were that it wanted:

a 12-kilometer-wide strip running along the Jordan River from the north (Tiberias) to a point a few miles north of Jericho. Jordan would be allowed to have corridors across this strip. The Israelis have noted also that they expect boundary changes in the west...the Israelis insist upon the new western frontier being completely opened for all Israelis. The Israelis also want a strip of territory running to the Hebron area.²⁹³

He was convinced that Israel was not serious about negotiating a settlement with Jordan but intended to annex significant parts of the West Bank.²⁹⁴ The United States put it on the record with Israel that it could not support the implementation of the Allon Plan,²⁹⁵ as it had envisaged that “only ‘really minor’ changes on security grounds” would be necessary while Israel’s position appeared to be “that security needs were being linked with substantial territorial acquisitions.”²⁹⁶ The United States’ stated that:

to us the words “recognized and secure” meant “security arrangements” and “recognition” of new lines as international boundaries. We had never meant that Israel could extend its territory to [the] West Bank or Suez if this was what it felt its security required.²⁹⁷

n.2; Doc.328, *Telegram from the Embassy in Jordan to the Department of State, 20 November 1968*, 653 at 654; and Doc.353, *Telegram from the Embassy in Jordan to the Department of State, 19 December 1968*, 697 at 699.

²⁹² XX FRUS 1964-68, Doc.328, *Telegram from the Embassy in Jordan to the Department of State, 20 November 1968*, 653 at 654.

²⁹³ XX FRUS 1964-68, Doc.373, *Telegram from the Embassy in Jordan to the Department of State, 30 December 1968*, 736 at 738.

²⁹⁴ XX FRUS 1964-68, Doc.344, *Telegram from the Embassy in Jordan to the Department of State, 9 December 1968*, 682 at 682 n.2; and Doc.373, *Telegram from the Embassy in Jordan to the Department of State, 30 December 1968*, 736 at 737.

²⁹⁵ XX FRUS 1964-68, Doc.321, *Memorandum of conversation, 14 November 1968*, 638 at 639.

²⁹⁶ XX FRUS 1964-68, Doc.320, *Telegram from the Department of State to the Embassy in Israel, 13 November 1968*, 633 at 634 and 637.

²⁹⁷ XX FRUS 1964-68, Doc.320, *Telegram from the Department of State to the Embassy in Israel, 13 November 1968*, 633 at 635-636.

This corresponds to the opinion expressed by the Argentinean representative to the Security Council after the unanimous adoption of resolution 242 regarding the meaning of “secure and recognized boundaries”:

164. ...the right "to live in peace within secure and recognized boundaries". We take this expression as really meaning to live in security within agreed boundaries. There are many parts of the world where frontier boundaries are not secure, if we attach to this concept a geo-strategic meaning which goes beyond mere legal connotations; yet despite that, the States concerned have the right to live in peace within those boundaries.

165. The United Kingdom Secretary of State, Mr. George Brown, defined this concept in a felicitous phrase when he spoke recently in the General Assembly, as follows—and I quote: "But equally, Israel's neighbours must recognize its right to exist, and it must enjoy security within its frontiers."²⁹⁸

Israel conceived its security interests in the West Bank in terms of settlements and territorial acquisition but as Blum points out, notions of what constitutes “secure” or strategic boundaries change with changes in military concepts and technology.²⁹⁹ Recent Israeli thinking emphasises developments in the means and methods of warfare that have occurred since 1967—“Terrorism has also been added to Israel’s concerns, in addition to the threat of conventional military attack.”³⁰⁰ To ensure Israel’s security, it has been claimed that Israel must control the high ground east of the central axis of the West Bank mountain ridge and also the Jordan Valley. Further, the wall is seen as inadequate to deal with potential terrorist threats which might emanate from the West Bank. Its primary aim is to counter infiltration but it cannot defend against sniper fire or mortar attacks: to deal with these, Israel is

²⁹⁸ Ruda, representative of Argentina, SCOR, 1382nd meeting (22 November 1967), S/PV.1382, paras.164-165.

²⁹⁹ Blum, above n.257 (*Secure boundaries*), 21-22.

³⁰⁰ Amidror Y, *Israel's requirement for defensible borders*, in *Defensible borders for a lasting peace* (<www.defensibleborders.org>: 2008) 17 at 18, see also 30-34.

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said to require security zones in the West Bank beyond the wall.³⁰¹ These proposals go further than the Allon Plan and are difficult to reconcile with the Palestinian's right to self-determination. Moreover, as the notion of militarily secure boundaries varies with circumstance and perceived threats, its implementation would seem not to result in a settled frontier, but rather one that changes with developments in military technology and tactics. In dismissing a plea that a boundary treaty should be revised, the International Court once declared:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed...Such a process could continue indefinitely, and finality would never be reached...Such a frontier, so far from being stable, would be completely precarious.³⁰²

It accordingly must be doubted whether the quest for secure boundaries is fundamentally illusory, and thus incapable of offering any justification, far less a legal justification, for the acquisition of territory. As Riad, the UAR foreign minister commented in 1968, everyone:

talks about peace and a settlement but the meaning of their words, plus particularly the phrase "secure boundaries" [is?] remote with everyone giving his own interpretation.³⁰³

³⁰¹ See Amidror, above n.300, 25-27, 38-39 and Appendix I 41-43; and Steinitz, above n.289, 14.

³⁰² *Temple of Preah Vihear case: merits judgment* (Cambodia v Thailand), ICJ Rep, 1962, 6 at 34.

³⁰³ XX FRUS 1964-68, Doc.258, *Telegram from the US Interests Section of the Spanish Embassy in the United Arab Republic to the Department of State, 19 September 1968*, 510.

XII. "DISPUTED TERRITORIES" AND THE "MISSING REVERSIONER"

Some have claimed that Israel is in lawful control of the occupied Palestinian territories because this resulted from measures taken in self-defense, and that no other State can show a better title to them. This has led Blum to contend that Israel's possession of the territories is "virtually indistinguishable from an absolute title...valid *erga omnes*."³⁰⁴ This is an extreme position which is at odds with Israel's recognition that the Palestinians are entitled to self-determination and its repeated commitment to implement Security Council resolutions 242 and 338 contained in Article 1 of the 1993 Declaration of Principles on Interim Self-government Arrangements and the preamble to the 1995 Interim Agreement on the West Bank and the Gaza Strip.

Nevertheless, the Government of Israel has challenged the status of the Palestinian territories as occupied, referring to them instead as "administered" or "disputed" territories³⁰⁵ or, in the case of the West Bank, as "Judea and Samaria". For example, a former legal adviser to the Israeli Foreign Ministry has stated:

Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has essentially been disputed land with the claimants being Israel, Jordan, and the Palestinians. Its ultimate status and boundaries will require negotiation between the parties, according to Security Council Resolutions 242 and 338.³⁰⁶

³⁰⁴ Blum, above n.26 (*Missing reversioner*), 294, above n.257 (*Secure boundaries*) 90-91, and above n.9 (*Jerusalem*), 21; see also Gerson, above n.25 (*Israel, West Bank*), 80-81; Rostow, above n.135 (*Palestinian self-determination*), 160-161; and Schwebel, above n.272 (*Conquest*).

³⁰⁵ For example, Gold, speaking as the Israeli representative in the General Assembly, employed the term "disputed territories" to refer to the occupied Palestinian territories in the debate regarding the draft of General Assembly resolution 52/250 (13 July 1998) which dealt with the participation of Palestine in the work of the United Nations, see UN Doc.A/52/PV.89 (7 July 1998) 3.

³⁰⁶ Sabel R, *The ICJ opinion on the separation barrier: designating the entire West Bank as "Palestinian territory"* (Jerusalem Center for Public Affairs: October 2005),

This ignores the administrative separation of Jordan from the territory of Mandate Palestine in 1922 and its consequent irrelevance to the question of Palestinian self-determination.

In the wake of the 1967 war, the “missing reversioner” argument gained currency in Israeli legal and political circles.³⁰⁷ In essence, this contends that Israel does not have the status of belligerent occupant in the territories seized from Jordan and Egypt during the Six Day War because neither was the displaced legitimate sovereign over these territories in terms of Article 43 of the Hague Regulations. It was claimed that as Jordan and Egypt had invaded the territory of Mandate Palestine in order to eradicate Israel, they had used force unlawfully in contravention of Article 2.4 of the United Nations Charter. Because they had unlawfully acquired control over the territories, Blum claims that Jordan, and by extension Egypt, were entitled at most to claim the status as belligerent occupants.³⁰⁸ The missing reversioner argument maintains, therefore, that neither Jordan nor Egypt possessed sovereignty over the territories they occupied.³⁰⁹ Accordingly, as the purpose of the law of belligerent occupation is to recognize the occupant’s rights of governance while safeguarding the revisionary rights of the ousted sovereign, where the latter does not exist, only those rules intended to safeguard the humanitarian rights of the population apply.³¹⁰ In particular, Israel has claimed that because the West Bank, East Jerusalem and Gaza were not part of the territory of a High Contracting Party to 1949 Geneva Convention IV, the Convention is inapplicable. The situation did not fall within the terms of Article 2 of the Convention

available at

www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=254&PID=0&IID=893

³⁰⁷ See Blum, above n.26 (*Missing reversioner*); and Shamgar M, *The observance of international law in the administered territories*, 1 Israel Yearbook on Human Rights 262 (1971) 263-266. See also Gerson, above n.25 (*Israel, West Bank*) 76-82; and Gorenberg G, *The accidental empire: Israel and the birth of the settlements, 1967-1977*, (Times Books: New York: 2006) 101.

³⁰⁸ Blum, above n.26 (*Missing reversioner*), 288 and 292-293, and above n.9 (*Jerusalem*), 15 and 18-21: see also Gerson, above n.25 (*Israel, West Bank*), 78-79 (although Gerson thinks that Jordan may have been more than a belligerent occupant in the West Bank, inventing the category of trustee-occupant in the process); and Shamgar, above n.307 (*Administered territories*), 265-266.

³⁰⁹ Blum, above n.26 (*Missing reversioner*), 293; Gerson, above n.25 (*Israel, West Bank*), 78; and Shamgar, above n.307 (*Administered territories*), 265-266.

³¹⁰ Blum, above n.26 (*Missing reversioner*), 293-294.

which provides, in part:

...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The missing reversioner argument is unconvincing, and was rejected by the International Court in the *Legal consequences of the construction of a wall* advisory opinion. It ruled that the Convention applies to any armed conflict between High Contracting Parties, and that it was irrelevant whether territory occupied during that conflict was under the sovereignty of one or other of the combatants. This interpretation was based on textual exegesis, the drafting history of Geneva Convention IV, the practice of parties to the Convention, the views of the International Committee of the Red Cross, General Assembly and Security Council, and also that of the Israel Supreme Court.³¹¹ This was a unanimous finding by the Court, as the sole dissenting judge, Judge Buergenthal, expressly concurred in this ruling.³¹² This conclusion had also been foreshadowed in a 14 September 1967 memorandum of the then legal advisor to the Israeli Foreign Ministry, Theodor Meron, which noted that the international community had rejected Israel's claim that the territories were not occupied:

We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not "normal" occupied territory and that certain countries (such as Britain in its speeches at the UN) have expressly stated that our status in the [West] Bank is that of an occupying State. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank

³¹¹ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 173-177, paras.90-101.

³¹² *Legal consequences of the construction of a wall* advisory opinion, declaration of Judge Buergenthal, ICJ Rep, 2004, 240, para.2.

is not occupied territory.³¹³

Further, as Gerson notes, Israel did not contest the lawfulness of Jordan’s control of the West Bank³¹⁴ and sought to conclude a peace treaty after the Six-Day War which would have returned the West Bank to Jordan,³¹⁵ albeit with modified borders. Jordanian repossession of the West Bank was the premise of the diplomatic negotiations and exchanges which preceded the adoption of Security Council resolution 242 and of immediate subsequent negotiations between Israel and Jordan which attempted to implement it.³¹⁶ This surely amounts to an implicit recognition by Israel that Jordan possessed title to the West Bank, thus negating the contention at the core of the missing reversioner argument, and thus the rationale for claiming that Geneva Convention IV was inapplicable.

³¹³ 14 September 1967 Meron memorandum entitled *Settlement in the administered territories*, original in Hebrew, Israel State Archives, 153.8/7921/3A, legal opinion numbered as document 289-291, with unnumbered cover notes. An English translation of this memorandum forms an annex to this paper, and may also be found at <www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>: quotation at 3. See also Gorenberg, above n.307 (*Accidental empire*), 101-102. Gorenberg provides a fragmented account of Meron’s opinion at 99-102, using a slightly different translation. A facsimile of the original Hebrew document may be found on Gorenberg’s website at <<http://southjerusalem.com/wp-content/uploads/2008/09/theodor-meron-legal-opinion-on-civilian-settlement-in-the-occupied-territories-september-1967.pdf>>.

³¹⁴ Gerson, above n.25 (*Israel, West Bank*), 80.

³¹⁵ As noted above, Israel’s stance was to ignore calls by West Bank Arabs for a separate existence, preferring instead to deal with Jordan: see XIX FRUS 1964-68, Doc.448, *Memorandum of conversation, 24 October 1967*, 944 at 946; Doc.491, *Telegram from the Mission to the United Nations to the Department of State, 26 October 1967*, 953 at 955; and Doc.494, *Memorandum from the President’s Special Counsel (McPherson) to President Johnston, 31 October 1967*, 961.

³¹⁶ See XX FRUS 1964-68, Doc.217, *Telegram from the Embassy in Jordan to the Department of State, 17 July 1968*, 424; Doc.268, *Telegram from Secretary of State Rusk to the Department of State, 1 October 1968*, 529; Doc.320, *Telegram from the Department of State to the Embassy in Israel, 13 November 1968*, 633; Doc.326, *Telegram from the Embassy in Israel to the Department of State, 19 November 1968*, 644 at 647-648, especially at 648, n.2; Doc.328, *Telegram from the Embassy in Jordan to the Department of State, 20 November 1968*, 653; Doc.344, *Telegram from the Embassy in Jordan to the Department of State, 9 December 1968*, 682, especially at 682, n.2; Doc.346, *Telegram from the Embassy in Israel to the Department of State, 11 December 1968*, 685; Doc.347, *Telegram from the Embassy in Israel to the Department of State, 11 December 1968*, 687; Doc.353, *Telegram from the Embassy in Jordan to the Department of State, 19 December 1968*, 697; and Doc.373, *Telegram from the Embassy in Jordan to the Department of State, 30 December 1968*, 736.

XIII. ISRAELI SETTLEMENTS IN OCCUPIED PALESTINIAN TERRITORY

Reflecting the international consensus, the International Court of Justice unanimously rejected Israel's claim that Geneva Convention IV is inapplicable to the occupied Palestinian territories.³¹⁷ Article 49.6 of the Convention provides:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

In the immediate aftermath of the Six-Day War, the Meron memorandum of 14 September 1967 prepared for Israel's Foreign Minister on *Settlement in the administered territories* concluded that "civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention."³¹⁸ Meron cited the authoritative official International Committee of the Red Cross commentary on Geneva Convention IV, which states that the purpose of Article 49.6 is to prevent the repetition of the practice of "certain Powers" during WWII "which transferred portions of their own population to occupied territory for political or racial reasons or in order, as they claimed, to colonise those territories."³¹⁹ Meron stated that this prohibition was "categorical and is not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in

³¹⁷ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 177, para.101. Judge Buergenthal, the sole dissenting judge, expressly affirmed the Court's finding that Geneva Convention IV was applicable—see Declaration of Judge Buergenthal, ICJ Rep, 2004, 240, para.2.

³¹⁸ 18 September 1967 letter transmitting the memorandum from Meron to Adi Yafeh, Political Secretary to the Prime Minister (original in Hebrew: English translation annexed): see also Gorenberg, above n.307 (*Accidental empire*), 99. A facsimile of the original Hebrew document may also be found on Gorenberg's website (see above n.313), and the English translation at <www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>.

³¹⁹ Meron memorandum, above n.313, 1: see also Gorenberg, above n.307 (*Accidental empire*), 101. The *Commentary* cited by Meron is Pictet J (Ed), *Commentary to Geneva Convention IV relative to the protection of civilian persons in time of war* (ICRC: Geneva: 1958), quotation at 283.

occupied territory of citizens of the occupying state,” therefore if Israeli citizens were to settle in the occupied territory it was “vital, therefore, that settlement is carried out by military and not civilian entities” within temporary camps.³²⁰

Nevertheless, in April 1968, the Department of State noted that the Israeli government was under increasing pressure to “authorize and facilitate the establishment of civilian settlements in the occupied areas.” Although the Israeli Foreign Ministry had been informed of the United States’ opposition, the US Embassy in Israel was instructed to restate its position “in strongest terms”, namely: that the creation of civilian or quasi-civilian settlements in occupied territory would seriously complicate the peace process; that the transfer of civilians into occupied areas was contrary to Article 49 of Geneva Convention IV; and that:

no matter what rationale or explanation is put forward by the [Israeli government], the establishment of civilian settlements in the occupies areas creates the strong appearance that Israel, contrary to the principle set forth in the UNSC Resolution [ie, resolution 242] and to US policy expressed in the President’s speech of June 19, does not intend to reach a settlement involving withdrawal from those areas.³²¹

When reports subsequently emerged that Israel planned to establish new settlements in the Golan Heights, Assistant Secretary of State for Near Eastern and South Asian Affairs Hart informed Rabin that these reports “could only be interpreted as pre-judging the question of sovereignty over areas presently occupied by Israel.” Rabin replied that “he saw no reason why Israel should not do what it wished to fulfill its responsibility for maintaining the territories under its control so long as Israel acted within the context of military occupation and abided by the Geneva Conventions.” In response to the observation that reports of settlements tended to confirm Arab suspicions that Israel did not intend to withdraw from the territories it occupied, Rabin commented that “in his view the Arabs would be more eager to negotiate the more they saw a danger that they would not get their

³²⁰ Meron memorandum, above n.313, 2: see also Gorenberg, above n.307 (*Accidental empire*), 101 for a slightly different translation of this passage.

³²¹ XX FRUS 1964-68, Doc.137, *Airgram from the Department of State to the Embassy in Israel, 8 April 1968*, 268 at 268-269.

territories back.”³²² This view was expressed more than a year after Meron had advised that the creation of settlements would breach Geneva Convention IV.

It is therefore not surprising that, in the *Legal consequences of the construction of a wall* advisory opinion, the International Court ruled, again unanimously, that settlements breached Geneva Convention IV.³²³ The Court further noted that the route of the wall enclosed 80% of the settlers living in the West Bank and that it was apparent that its “sinuous route” was intended to encompass the “great majority” of settlements.³²⁴ It continued that although Israel had given assurances that the wall was a temporary measure, its construction created a *fait accompli* which “could well become permanent, in which case, and notwithstanding the formal characterisation of the wall by Israel, it would be tantamount to de facto annexation.”³²⁵ As has been demonstrated above, the unilateral annexation of conquered or occupied territory is unlawful.

Further, as Greig observes, Israel’s claim that settlements are necessary for security purposes is difficult to justify as a furtherance or prolongation of the exercise of the right to self-defense invoked in 1967.³²⁶ This claim gains credence from Gorenberg’s account of the start of the settlement process as being characterized by governmental disagreement and an unwillingness or inability to prevent or remove settlements whose impetus came from grassroots movements.

As for the possibility that Israel might invoke the right of self-defense under international law to protect settlements, two considerations preclude this. In the first place, as the West Bank is under occupation, recourse to self-defense is simply no longer an option open to Israel. During the *Legal consequences of the construction of a wall* proceedings, Palestine stated that the Israeli claim that the wall had been constructed as a measure taken in self-defense involved an illegitimate elision of legal categories, “an impermissible confusion” between the *ius ad bellum* (the law governing resort to armed force) and the *ius in bello* (the law

³²² XX FRUS 1964-68, Doc.339, *Memorandum of conversation, 4 December 1968*, 62 at 672-673.

³²³ Opinion of the Court, ICJ Rep, 2004, 183-184, para.120, and Declaration of Judge Buergerthal, 244, para.9.

³²⁴ ICJ Rep, 2004, 183, para.119.

³²⁵ ICJ Rep, 2004, 184, para.121.

³²⁶ Greig, above n.279 (*Self-defence*), 397.

applicable during an armed conflict) which must be kept separate:³²⁷

The Fourth Geneva Convention permits forcible measures against civilian populations, subject to strict limits. That exhausts the legal rights of an Occupying Power. A State may not use all of its powers under the Fourth Geneva Convention and the Laws of War and then decide that those powers are inadequate and invoke the more general right of self-defense, which belongs to the *jus ad bellum*, in order to avoid the constraints of international humanitarian law.³²⁸

The irrelevance of the *ius ad bellum*, and thus the invocation of self-defense, flows logically from the Court's finding that Geneva Convention IV is applicable *de iure* to the Occupied Palestinian Territory. As the Court affirmed "according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when...there exists an armed conflict (whether or not a state of war has been recognized)."³²⁹ Once this trigger has been met and Geneva Convention IV is applicable, the time when self-defense could be invoked has passed: the resort to force has already occurred, and the situation is now governed by the different regime of the law of armed conflict. The right to take defensive measures in response to threats does not entail that these qualify or should be justified as measures taken in self-defense under Article 51 of the Charter. To equate the two is simply to confuse the legal with the linguistic denotation of the term "defense". Just as "negligence", in law, does not mean "carelessness" but rather refers to an elaborate doctrinal structure, "self-defense" refers to a complex doctrine that has a much more restricted scope than ordinary notions of "defense".

In the second place, the Court's unanimous finding that Israeli settlements within occupied Palestinian territory are illegal

³²⁷ *Legal consequences of the construction of a wall* Pleadings, Oral hearings of 23 February 2004, CR 2004/1, Professor Abi-Saab, 44: see 44-45.

³²⁸ *Legal consequences of the construction of a wall* Pleadings, Palestine written statement, 233-234, para.534. See also Scobbie I, *Words my Mother never taught me—"In defense of the International Court"*, 99 American Journal of International Law 76 (2005).

³²⁹ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 174-175, para.95.

because they are in breach of Article 49(6) of the Fourth Geneva Convention is relevant. During the oral phase of the *Legal consequences of the construction of a wall* proceedings, Sir Arthur Watts observed that the construction of the wall could not be justified as a measure taken in self-defense to protect settlements in the West Bank as these were themselves unlawful.³³⁰ This point was not elaborated further, although it was upheld by Judge Buergenthal.³³¹ In its written representation to the Court, however, Israel noted that:

It cannot be open to a party to seek a remedy from a court in circumstances in which it has committed the wrong that has brought about the very situation which is under examination. This follows from the principle...no one can be allowed to reap advantage from his own wrong.³³²

Insofar as forcible self-defense might be invoked to protect settlements, this would be action taken in relation to an internationally wrongful act, the emplacement of settlements in occupied territory, for which Israel bears responsibility. Self-defense is an exculpatory plea employed to justify the otherwise unlawful act of employing force beyond one's borders. To absolve a State of responsibility for an unlawful act taken as a direct consequence of an earlier unlawful act it committed is surely to allow it to profit from its own wrong.

This is not to say that Israel may not protect its citizens who are settlers, but this should be categorized as a security issue rather than one which partakes of the privileges accorded to a lawful exercise of self-defense under international law. Moreover, the lawful protection of nationals situated outside a State's

³³⁰ *Legal consequences of the construction of a wall* Pleadings, Oral hearings of 24 February 2004, CR 2004/3, Sir Arthur Watts, 57 at para.9: see also Jordan written statement, 144-145 at paras.5.283-5.284.

³³¹ *Legal consequences of the construction of a wall* advisory opinion, declaration of Judge Buergenthal, ICJ Rep, 2004, 244, para.9, "the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence".

³³² *Legal consequences of the construction of a wall* Pleadings, Israel written statement, 15, 114, para.9.4: see 113-14, paras.9.3-9.4.

territory characteristically requires their evacuation and not their fortification, as was demonstrated by the 1976 Entebbe incident.³³³

³³³ On Entebbe, see Green LC, *Rescue at Entebbe—legal aspects*, 6 Israel Yearbook on Human Rights 312 (1976); and see, generally, Wingfield TC and Meyen JE (Eds), *Lillich on the forcible protection of nationals abroad* (Naval War College: Newport, RI: 2002).

XIV. THE FUTURE OF THE TERRITORY

As the Permanent Court of International Justice observed in the *Eastern Greenland* case, in litigation involving competing claims to sovereignty over territory, it is most often the case that “the tribunal has had to decide which of the two is stronger.”³³⁴ A claimant does not usually have to demonstrate that it has an absolute title to the territory, but only that it has a relatively stronger title than its opponent. In the specific case of the territory of Mandate Palestine, there are only be two parties which may make a claim—Israel and the Palestinian Arab population: any purported Jordanian interest is excluded by virtue of separation of the territories in 1922, and thus by the operation of the *uti possidetis* principle. Further, because that territory did not fall within the category of *terra nullius* during the currency of the Mandate or on its termination, no other entity can advance any legitimate claim to title.

The right of the Palestinian people to self-determination has been recognised by Israel, and authoritatively endorsed by the International Court of Justice.³³⁵ This right is inextricably linked to a territorial space, which can only be found within the territory of the former Mandate. Because the right to self-determination has the status of a *ius cogens* entitlement, it nullifies any countervailing argument that the Palestinian people abandoned its claim by rejecting the Partition Plan contained in resolution 181. This is apart from any other relevant considerations, in particular the non-binding nature of General Assembly resolutions which, moreover, are *res inter alios acta* for entities which are not members of the United Nations. Self-determination is a peremptory claim, and indeed was invoked in the rejection of the Partition Plan.

On the other hand, Israel exists and is recognised as a

³³⁴ *Case concerning Eastern Greenland* (Denmark v Norway) PCIJ Ser.A/B, No.53 (1933) at 46: see also *Case concerning Minquiers and Ecrehos* (France/United Kingdom), ICJ Rep, 1953, 47 at 67.

³³⁵ See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171-172, para.88 and 199, paras.155-156.

State by the international community. It cannot be extinguished by any claim to its territory, whether advanced by the Palestinians or any other entity or State. In relation to the area bounded by the 1949 armistice demarcation lines, it has a stronger claim to title than any rival, but these lines delineate its maximum territorial extent. Historically Israel did not, and consequently cannot, claim title to all of the territory of Mandate Palestine, and similarly cannot deny the exercise of Palestinian self-determination and the attainment of independence in areas beyond these lines. In the *Legal consequences of the construction of a wall* advisory opinion, the International Court of Justice expressly recalled that Israel was under an obligation to respect this right.³³⁶

To the extent that the creation of Israel rests on the partition of the territory of Mandate Palestine as this was envisaged in resolution 181, it is in a position akin to that of South Africa in relation to South West Africa.³³⁷ It cannot accept rights, or title, to part of Mandate Palestine while denying the obligation partition imposed on itself, namely, the creation of an Arab State in the remainder of the Mandate territory. Even if resolution 181 is legally irrelevant to the creation of Israel, it is nevertheless precluded from laying claim to all of the territory of Mandate Palestine by virtue of its own actions, namely its avowal that it was only created on part of that territory and thus it was not the successor to Mandate Palestine.

Should the Middle East Peace Process fail, whether Israel could lawfully continue to govern the occupied Palestinian territories essentially depends on the circumstances of that failure. While some commentators claim that the occupation has already become illegal,³³⁸ Benvenisti argues that this conclusion is dependent on a wilful failure to reach a settlement:

an occupation regime that refuses to earnestly contribute to efforts to reach a peaceful solution should be considered illegal. Indeed, such a refusal should be considered outright annexation. The occupant has a duty

³³⁶ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 199, paras.155-156.

³³⁷ See *International status of South West Africa* advisory opinion, ICJ Rep, 1950, 133.

³³⁸ See, for example, Ben-Naftali O, Gross A and Michaeli K, *Illegal occupation: framing the occupied Palestinian territory*, 23 Berkeley Journal of International Law 551 (2005).

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under international law to conduct negotiations in good faith for a peaceful solution. It would seem that an occupant who proposes unreasonable conditions, or otherwise obstructs negotiations for peace for the purpose of retaining control over the occupied territory, could be considered a violator of international law.³³⁹

Within the context of Palestine, the International Court specifically recalled that under General Assembly resolution 2625 (XXV)(24 October 1970), the *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.³⁴⁰

This places another layer of obligation on Israel: not only is it bound to negotiate in good faith to end the occupation, but also it is under a peremptory duty to promote Palestinian self-determination.

But this peremptory duty is one which binds all States and, by extension, the United Nations as there is authority for the proposition that States cannot evade their international obligations by hiding behind the independent personality of an international organization of which they are members. This question was examined, admittedly obliquely, in a case heard by the European Court of Justice, namely *SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)*.³⁴¹ In his opinion to the Court, Advocate General Tesauro expressed the view that the fact that Eurocontrol was an international organisation did not insulate it from the

³³⁹ Benvenisti, above n.256 (*Occupation*), 146.

³⁴⁰ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 199, para.156.

³⁴¹ 101 International Law Reports 9 (1994). Eurocontrol, an inter-governmental organisation, was established in 1960 to provide common air navigation services in the airspace of it European member States.

Community's competition laws. In justifying his conclusion, Advocate General Tesauro argued:

Just as it is not permissible for a Member State to have recourse to its own domestic law in order to limit the scope of Community law, since that would undermine the unity and effectiveness of Community law, so it would not be possible to arrive at a similar result by relying on the obligations arising from an international agreement... In other words, if national public bodies and Member States themselves, in so far as they carry on an economic activity, are under an obligation to respect the provisions of Article 85 et seq. of the Treaty, they may not escape that obligation by entrusting the activity to an international organization.³⁴²

This consideration is capable of a more general application beyond the confines of the European legal order. *Prima facie* it seems illegitimate to allow States to evade responsibility simply through the fact of combination.

In the *Legal consequences of the construction of a wall* advisory opinion, the International Court underlined that the General Assembly should encourage efforts aimed at reaching a negotiated solution to the Israel-Palestine conflict which would lead to the creation of a Palestinian State,³⁴³ and that both it and the Security Council should consider what further action is required to bring an end to the illegal situation resulting from the construction of the wall.³⁴⁴ Whether this obligation should lead the United Nations to intervene to impose a solution, failing agreement between the parties, is one which depends to some extent on political will. At the very least, however, it would appear that the United Nations, and particular the General Assembly and Security Council, is under a duty to act in good faith to foster co-operation to ensure that Palestinian self-determination is achieved. As self-determination has peremptory status as a *ius cogens* norm, a failure to do so amounts to a breach of international law by the United Nations which would engage its international

³⁴² 101 International Law Reports 17, para.7.

³⁴³ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 201, para.162.

³⁴⁴ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 200, para.160.

responsibility.

An analogy may be drawn here with genocide, which also is a peremptory norm. In his *Third report on the responsibility of international organisations*, prepared for the International Law Commission, Professor Gaja stated that, under certain circumstances, the United Nations may be under a duty to prevent genocide. Using the failure to prevent genocide in Rwanda as an example, he commented:

Assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.³⁴⁵

A failure by the United Nations to foster self-determination when it is in a position to do so is no different from a failure to prevent genocide. In both cases, the United Nations would simply be failing to act to discharge obligations which are incumbent on all its member States, as well as on itself. While the duty upon States to co-operate to bring to an end serious breaches of peremptory norms of international law does not necessarily mean that this takes place within the United Nations,³⁴⁶ as the International Court indicated, this is also a duty which the principal political organs of the United Nations should also discharge.

³⁴⁵ UN Doc.A/CN.4/553 (13 May 2005) 4, para.10, note omitted.

³⁴⁶ International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to Article 41 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts*, 113 at 114, para.2, available at <<http://untreaty.un.org/ilc/reports/2001/2001report.htm>>; II.ii Yearbook of the International Law Commission (2001), UN Doc.A/CN.4/SER.A/2001/Add.1 (Part 2), 113 at 114, para.2; and also Crawford, above n.57 (*State responsibility*), *Commentary to Article 41*, 249, para.2.

APPENDIX: MERON OPINION (1967)

[emblem]

Ministry of Foreign Affairs

Jerusalem, 13 Elul 5727
18 September 1967

TOP SECRET

To : Mr Adi Yafeh, Political Secretary to the Prime Minister
From : Legal Adviser, Ministry of Foreign Affairs

Subject: Settlement in the Administered Territories

At your and Mr Raviv's request, I am enclosing herewith a copy of my memorandum of 14.9.67 on the above subject, which I submitted to the Minister of Foreign Affairs. My conclusion is that civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention.

Regards,
[signed]
T. Meron

Copy: Mr A. Shimoni, Head of the Minister's Office

The Israel-Palestine Conflict in International Law

Jerusalem, 16 Elul 5727
21 September 1967

TOP SECRET

Minister of Justice

Dear Minister,

Subject: Settlement in the Administered Territories

Please find enclosed a copy of a memorandum on the above subject, which was written by the Legal Counsel to the Ministry of Foreign Affairs after a conversation with me.

The Prime Minister has asked that your attention be drawn to the enclosed with a view to the establishment of outposts, army bases and settlement points and the settlement of refugees in the administered territories.

The Prime Minister will be grateful for your opinion.

Regards,

Aviad Yafeh
Head of the Prime Minister's Office

Copy: Dr Y. Herzog

TOP SECRET

14.9.67

TOP SECRET

Minister of Foreign Affairs
Legal Adviser

Most Urgent

Subject: Settlement in the Administered Territories

Mr Raviv wrote to me to say you had asked for my opinion "on restrictions and dispensations under international law for occupying states where it concerns the cultivation of lands".

The above question is very general and difficult to answer but I understand it in the context of what I have heard from Mr Adi Yafeh, that is to say, in relation to the possibility of Jewish settlement in the [West] Bank and the [Golan] Heights as well as the settlement of Arab refugees from Gaza in El-Arish or the [West] Bank. In this opinion, I will deal only with the first question, which, from a political and legal point of view, seems to me to be the most delicate. I am afraid there is in the world very great sensitivity to the whole question of Jewish settlement in the administered territories and any legal arguments that we are trying to find will not counteract the heavy international pressure that will be exerted upon us even by friendly countries which will base themselves on the Fourth Geneva Convention. These countries may claim that, while they expect for Israel to settle Arab refugees, Israel is busy settling the administered territories with its citizens.

From the point of view of international law, the key provision is the one that appears in the last paragraph of Article 49 of the Fourth Geneva Convention. Israel, of course, is a party to this Convention. The paragraph stipulates as follows:

"The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies".

The Commentary on the Fourth Geneva Convention prepared by the International Committee of the Red Cross in 1958 states:

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This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference. It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words “transfer” and “deport” is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.

[page 2]

The prohibition therefore is categorical and not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state. If it is decided to go ahead with Jewish settlement in the administered territories, it seems to me vital, therefore, that settlement is carried out by military and not civilian entities. It is also important, in my view, that such settlement is in the framework of camps and is, on the face of it, of a temporary rather than permanent nature.

Even if we settle an army and not civilians, we must, from the point of view of international law, have regard to the question of ownership of the land that we are settling. Article 46 of the Hague Regulations concerning the Laws and Customs of War on Land (Annexes to the Hague Convention (IV) of 1907), regulations that are regarded as a true expression of customary international law that is binding on all countries, states in relation to occupied territory that:

“private property ... must be respected. Private property cannot be confiscated”.

Appendix

As regards state lands, Article 55 of the Hague Regulations stipulates that an occupying state is permitted to administer the property and enjoy the fruits of the property of the occupied state. Even here there are specific limitations on the occupying state's freedom of action, which derive from the occupying state not being the owner of the property but having merely enjoyment of it.

In relation to the properties of charitable, religious or educational institutions or municipalities, they are treated under Article 56 of the Hague Regulations as private property.

It will be noted that an order concerning abandoned property (private property) (Order No. 58), issued by Brigadier Narkiss as IDF Commander in the West Bank region (and Order No. 59) concerning state property are in fact in keeping with the provisions of the Hague Regulations on the observance of property rights.

I will now go on to discuss a number of concrete issues pointed out by Mr Yafeh.

A. Regarding the possibility of engaging in any kind of agricultural activity and settlement on the Golan Heights, it has to be said that the Golan Heights, which lie outside the area of the mandated Land of Israel, are unequivocally "occupied territory" and are subject to the prohibition on settlement. If it is decided to establish any outposts, it is essential that it is done by the army in the form of camps and that it does not point to the establishment of permanent settlements.

B. In terms of settlement on the [West] Bank, we are trying not to admit that here too it is a matter of "occupied territory". We argue that this area of the mandated Land of Israel was divided in 1949 only according to the Armistice Lines, which, under the agreements themselves, had merely military, not political, significance and were not determinative until the

[page 3]

final settlement. We go on to say that the agreements themselves were achieved as a temporary measure according to the Security Council action based on Article 40 of the United Nations Charter.

We also argue that Jordan itself unilaterally annexed the West Bank to the Kingdom of Jordan in 1950 and that the Armistice Lines no longer exist because the agreements expired due to the war and Arab aggression. We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not “normal” occupied territory and that certain countries (such as Britain in its speeches at the UN) have expressly stated that our status in the [West] Bank is that of an occupying state. In truth, certain actions by Israel are even inconsistent with the claim that the [West] Bank is not occupied territory. For example, Proclamation No. 3 of the IDF Forces Commander in the West Bank of 7.6.67, which brings into force the order concerning security regulations (in Section 35), states that:

“A military court and the administration of a military court will observe the provisions of the Geneva Convention in terms of protecting civilians in time of war in everything relating to legal proceedings and where there is conflict between this order and the aforementioned Convention, the provisions of the Convention will prevail”.

With regard to the Gush Etzion, settlement there could to a certain extent be helped by claiming this is a return to settlers’ homes. I assume that there are no difficulties here with the question of property although the matter requires close examination. With the Gush Etzion too, we have to expect, in my view, negative international reaction on the basis of Article 49 of the Geneva Convention. Furthermore, in our settlement in the Gush Etzion, evidence of intent to annex the [West] Bank to Israel can be seen.

On the possibility of settlement in the Jordan Valley, the legal situation is even more complicated because we cannot claim to be dealing with people returning to their homes and we have to consider that problems of property will arise in the context of the Hague Regulations. I cannot go further into this question without having a lot more detail.

On the issue of the settlement of Arab refugees, which is, in my opinion, a less complex issue from both a political and a legal point of view, I will write separately.

Appendix

Regards,
[signed]
T. Meron

Copy: Director-General
Mr S. Hillel

Translator's Note

1. Square brackets indicate where the original was unclear or illegible or where the translator has inserted an explanatory comment of his own.

ABOUT THE AUTHORS

Iain Scobbie is the Sir Joseph Hotung Research Professor in Law, Human Rights and Peace Building in the Middle East at the School of Oriental and African Studies, University of London. Professor Scobbie studied at the Universities of Edinburgh and Cambridge, and at the Australian National University.

He is a member of the Executive Board of the European Society of International Law; of the Governing Board of the Scottish Centre for War Studies, which is based in the University of Glasgow; of the International Advisory Council of Diakonia's International Humanitarian Law Programme, which is based in Jerusalem; and formerly of the Lieber Society on the Law of Armed Conflict. He is also a member of the Scientific Advisory Board of the European Journal of International Law, and of the Commissioning Panel of the AHRB/ESRC Religion and Society programme.

Sarah Hibbin is a research assistant at the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East, which she joined after receiving an MA in International and Comparative Legal Studies from the School of Oriental and African Studies, University of London in 2004. In 2008 she received a diploma in International Humanitarian Law from the International Committee of the Red Cross. Her research has focused on legal problems encountered by prolonged military occupations and their termination.

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